[redacted]

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. 888.

[redacted]

[redacted] TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

[redacted] TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY.

[redacted] FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

[redacted]

[redacted]

(25,172)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1916.

1 & 2 *Caption.*

Be it remembered, that at a term of the District Court of the United States for the Northern District of Texas, begun and holden at Dallas, Texas, on January 10th A. D. 1916, and which term is still in session, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had upon the motions of the defendants the New Orleans Pacific Railway Company and the Texas and Pacific Railway Company to dismiss the bill of complaint in the following cause, to-wit:

No. 2795/51. In Equity.

BANKERS TRUST COMPANY, as Trustee,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY and THE NEW ORLEANS PACIFIC RAILWAY COMPANY.

3 Back of Original Bill of Complaint: Filed Dec. 27, 1915. No. 2795/51. Equity. Bankers Trust Company, as Trustee, v. The Texas and Pacific Railway Company, et al. Bill of Complaint. Filed 27 day of Dec., 1915. Louis C. Maynard, Clerk.

4 Title page of amendments to original bill of complaint: Filed February 8, 1916. In the District Court of the United States within and for the Northern District of Texas, Dallas Division. Bankers Trust Company, as Trustee, Complainant, against The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, Defendants. In Equity. No. 2795/51. Complainant's Amendments to its Bill of Complaint. Locke & Locke, Praetorian Building, Dallas, Texas, Alexander & Green, 120 Broadway, New York City, Solicitors for Complainant. Maurice E. Locke, W. W. Green, Of Counsel. Filed 8 day of February, 1916. Louis C. Maynard, Clerk, by E. C. Van Dusen, Deputy.

IN THE

1 DISTRICT COURT OF THE UNITED STATES

WITHIN AND FOR THE

NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BANKERS TRUST COMPANY, as Trustee, Complainant, AGAINST THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY 2 COMPANY, Defendants.	In Equity No. 2795/51

Amended Bill of Complaint

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION:

Bankers Trust Company, a corporation of the State of New York, brings this its amended bill of complaint against The Texas and Pacific Railway Company, a corporation duly created by and existing under the laws of the United States of America, having its 3 principal operating office and place of business in the City of Dallas in the State of Texas, and New Orleans Pacific Railway Company, a corporation of the State of Louisiana, and thereupon your orator complains and alleges:

I. That your orator Bankers Trust Company is, and at all the times wherein it is hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State

of New York, and has its office and principal place of business in the Borough of Manhattan, in the City, County and State of New
4 York, is a citizen of said State and a resident and inhabitant of the Southern District of New York, and is duly authorized and empowered to hold in trust the property conveyed to it or its predecessor, as hereinafter fully set forth, and to execute the trusts set forth and declared in the mortgage or deed of trust hereinafter referred to as the Second Mortgage.

II. That the defendant The Texas and Pacific Railway Company (hereinafter called the defendant Texas Company) is, and at
5 all the times wherein it is hereinafter mentioned was, a corporation duly created by and existing under the laws of the United States of America, and has its principal place of business and its principal operating and general offices in the City of Dallas in the State of Texas, in the Dallas Division of the Northern District of Texas, and that a material and substantial part of the railroads owned and operated by it as hereinafter described, to wit, over four hundred miles thereof, are located in said Northern District of Texas, and the defendant Texas Company is a resident and inhabitant of the said Dallas Division of said Northern District of Texas.

6 III. That the defendant New Orleans Pacific Railway Company (hereinafter called the defendant New Orleans Company) is, and at all the times wherein it is hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Louisiana, and has its principal place of business in the City of New Orleans, in said State, and is a citizen of said State and a resident and inhabitant of the Eastern District of Louisiana.

IV. Your orator further shows that, pursuant to the power conferred upon the Congress of the United States by the Constitution
7 of the United States, Congress duly enacted an Act entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes," approved on or about the third day of March, 1871 (16 U. S. Statutes at Large, 573). That in and by said Act it is provided that said the Texas Pacific Railroad Company shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States. That by virtue of said
8 Act of Congress and of said provision thereof and of the Act of Congress approved May 2, 1872 (17 U. S. Statutes at Large, 59), hereinafter in this paragraph referred to, jurisdiction was conferred upon this Court of this cause against the defendant Texas Com-

pany and this Court continues to have, and still has, jurisdiction thereof so conferred as aforesaid:

V. That said Act of Congress approved March 3, 1871, provides by Section 11 thereof:

"That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds, secured by mortgage, namely: first, construction bonds; second, land
9 bonds. Construction bonds shall be secured by mortgage, first, on all or any portion of the franchises, roadbed, or track of said railroad, and all the appurtenances thereto belonging, when constructed or in the course of construction, from a point at or near Marshall, to ship's channel, in the Bay of San Diego, in the State of California, as aforesaid. Land bonds shall be secured by mortgage, first, on all or any portion of the lands hereby granted in aid of the construction of said railroad as is provided for in this act; second, on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of lands may have been made, or may hereafter be made by any congressional, State or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation: *Provided*, that all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed: *And provided also*, That the proceeds of the sales of the aforesaid
10 construction and land bonds shall be applied only in the construction, operation, and equipment of the contemplated railroad line: *And provided further*, That said mortgage shall in no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation."

And in Section 14 thereof:

"* * * All the bonds and mortgages issued by said company must be signed by the president and secretary, and attested by the seal of said company, and shall contain an extract from the law authorizing them to be issued. The face value of said bonds shall be one thousand dollars in gold, and shall be redeemable at such times, and to bear such rate of interest payable semi-annually in gold, as may be determined by the directors. The total value of the construction bonds to be issued shall not exceed thirty thousand

dollars per mile of said railroad, and the total face value of the land bonds shall not exceed two dollars and fifty cents per acre for all lands mortgaged; the total amount of each to be determined by the board of directors."

That pursuant to the power conferred upon it by the Constitution of the United States, Congress duly enacted an act entitled "An Act supplementary to an Act entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes,' approved March third, eighteen hundred and seventy one", approved on or about May 2, 1872 (17 U. S. Statutes at Large, 59), which among other things provides:

"That the name, style and title of the Texas Pacific Railroad Company shall hereafter be "The Texas and Pacific Railway Company;" and the said The Texas and Pacific Railway Company shall have, possess and enjoy all the rights, privileges and franchises heretofore conferred upon the said Texas Pacific Railroad Company.

"SEC. 2. That the said The Texas and Pacific Railway Company shall have power and authority to issue the construction and land bonds authorized by the eleventh section of said act of incorporation, for such amounts, not exceeding forty thousand dollars per mile of said road, of construction bonds, as said company may deem needful to provide for the construction and equipment of its line, and to include in the mortgage or mortgages to secure said construction bonds all or any portion of the lands granted in aid of the construction of said railroads; and in the mortgage or mortgages to secure said land bonds, any portion of said lands not so used to secure the construction bonds aforesaid; and all or any portion of the lands acquired by the terms of consolidation lawfully authorized by the fourth section of said act of March third, eighteen hundred and seventy-one, with any railroad company or companies to whom grants of land may have been made, or may hereafter be made, by any congressional, State, or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation, and within the time limited for the completion of the road, and all such lands of every description shall be subject to all limitations and conditions now by law existing in relation thereto, and as modified by this act; and this act shall not be construed to revive, enlarge, extend or create any land grant whatever, beyond that heretofore granted by Congress, and which shall duly inure to said company upon

compliance with the terms of this act in relation to the times fixed for the completion of said railway, and all such mortgages shall be subject to all the conditions and limitations
14 by law existing under this act and the acts to which it is supplementary in respect of such lands, and shall not be held to vest any title in the mortgage or create any lien on such lands, other than such company is or may become lawfully entitled to vest or create thereunder; but the amount of said land bonds shall not exceed two and a half dollars per acre for all lands covered by the mortgage or mortgages securing the same.

"SEC. 3. That all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution: *Provided*, That the aforesaid bonds and the authorized capital stock, or the proceeds thereof, shall be applied only for the purpose of securing the construction, operation and equipment of the contemplated railroad line, under lawful contracts with such par-
15 ties, and on such terms and conditions as said company may deem needful, and for the further purpose of purchase, consolidation, completion, equipment, and operating of the other roads, as contemplated by said act and specified therein, being a part of the aforesaid railroad line, and for the expenses necessary and incident to the works authorized thereby: *Provided, however*, That said road and its equipment shall be of the standard heretofore required by the United States Government for the existing Pacific Railway lines: *And provided further*, that said mortgage or mortgages shall in no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation."

That pursuant to the power conferred upon it by the Constitution of the United States, Congress duly enacted an act entitled "An Act supplemental to an Act entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and
16 for other Purposes,' approved March third, eighteen hundred and seventy-one", approved on or about March 3, 1873 (17 U. S. Statutes at Large, 598), which provides:

"That the face value of all bonds hereafter issued by the Texas and Pacific Railroad Company, under the provisions of an act approved March third, eighteen hundred and seventy-one, shall, at the option of the company, be either in gold, or other lawful money of the United States,

bearing interest, at like option of the company, either in gold or other lawful money of the United States; and any mortgage heretofore executed by said company, securing bonds payable in any lawful money of the United States other than gold, and the bonds recited therein, and to secure which, said mortgage was given, are hereby legalized, and said mortgage and bonds shall have the same effect as though they had been authorized by the act to which this is
17 a supplement. *Provided*, That in all other respects the requirements of that law in regard to such mortgage and bonds have been fully complied with".

That pursuant to the power conferred upon it by the Constitution of the United States, Congress duly enacted an act entitled "An act supplementary to the act entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes'", approved on or about June 22, 1874 (18 U. S. Statutes at Large, 197), which, among other things, provides:

18 "That the Texas and Pacific Railway Company is hereby empowered to secure, by one or more mortgages upon the whole or any portion of its line, the construction-bonds heretofore authorized to be issued, and to cancel the mortgage now on record with the Secretary of the Interior so far as the same can be done without prejudice to existing rights, and to substitute therefor the mortgage or mortgages hereby authorized, which substituted mortgages shall expressly reserve all rights which may have been acquired under the existing mortgage: *Provided*, That the aggregate of the said bonds to be issued under and secured by said mortgage or mortgages shall not exceed the limit heretofore fixed by Congress; and said mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Trans-continental Railway Company, heretofore merged in and consolidated with the said Texas and Pacific Railway Company, under the authority and requirements of the laws of the State of Texas; and which roads so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of the said Texas and Pacific Railway Company, and
19 shall hereafter be subject to all the provisions and limitations of the act of Congress incorporating said company and of the supplements thereto: * * * "

VI. That said Act of Congress approved March 3, 1871 (16 U. S. Statutes at Large 573), by Section 4 thereof provides:

> "That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State, or territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of rail-
20 roads to the Pacific Ocean."

And by Section 6 thereof:

> "That the rights, lands, land grants, franchises, privileges, and appurtenances, and property of every description, belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company; *Provided*, that in all contracts made and entered into by said company with any and all other railroad company or companies, to perfect such aforesaid consolidation or purchase, the indebtedness or other legal obligations of said company or companies shall be assumed by the said Texas Pacific Railroad Company as may be agreed upon, and no such consolidation or purchase shall impair any lien which may exist on any of the railroads so consolidated or purchased; but said Company shall not assume the debts or obligations of any company with which it may consoli-
21 date or purchase as aforesaid, to an amount greater than the cash value of the assets received from the same."

VII. Your orator is informed and believes and therefore alleges that by an act of the legislature of the State of Texas approved on or about February 16, 1852, entitled "An act to incorporate the Texas Western Railroad Company" there was created a corporation by the name of Texas Western Railroad Company; that thereafter by an act of the legislature of the State of Texas approved on or about August 16, 1856, entitled "An act to amend the caption and
22 the first and sixteenth sections of an act to incorporate the Texas Western Railroad Company, approved February 16, 1852" the name of said Texas Western Railroad Company was changed to Southern Pacific Railroad Company; and that on and prior to the twenty-first day of March, 1872, said Southern Pacific Railroad

Company, duly created by and existing under said acts and the laws of the State of Texas, owned, possessed and operated certain lines of railroad located in the State of Texas on the route prescribed for the defendant Texas Company in said acts of Congress, and by virtue of said acts and certain other laws of said State of Texas said Southern Pacific Railroad Company was authorized and empowered to issue bonds of the character of the bonds described in the Second Mortgage of the
23 defendant Texas Company, of which a copy is hereto annexed marked Exhibit A (hereinafter called the Income Bonds), and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about the twenty-first day of March, 1872, said Southern Pacific Railroad Company by indenture bearing that date duly sold and conveyed to the defendant Texas Company all the railroads, franchises, rights, privileges, grants and property of said Southern Pacific Railroad Company, and consolidated itself with the defendant Texas Company by sale, and the defendant Texas
24 Company, in compliance with the terms and conditions prescribed by said acts of Congress and by the laws of the State of Texas, and by virtue of the power and authority conferred upon it by said acts and laws, purchased and acquired by said indenture all said railroads, franchises, rights, privileges, grants and property; and by virtue of the provisions of said acts of Congress and of said laws of Texas and of said sale, conveyance and consolidation, said rail-
25 roads, franchises, rights, privileges, grants and property vested in and became absolutely the property of the defendant Texas Company.

VIII. Your orator is informed and believes and therefore alleges that by an act of the legislature of the State of Texas approved on or about July 27, 1870, entitled "An Act, to incorporate The Southern Trans-Continental Railway Company" there was created a corporation by the name of The Southern Trans-Continental Railway Company; and that on and prior to the thirtieth day of March, 1872, said Southern Trans-Continental Railway Com-
26 pany, duly created by and existing under said act and the laws of the State of Texas, owned, possessed and operated certain lines of railroad located in the State of Texas on the route prescribed for the defendant Texas Company in said acts of Congress, and by virtue of said acts and certain other laws of the State of Texas said Southern Trans-Continental Railway Company was authorized and

empowered to issue bonds of the character of the Income Bonds
27 and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about said thirtieth day of March, 1872, said Southern Trans-Continental Railway Company by indenture bearing that date duly sold and conveyed to the defendant Texas Company all the railroads, franchises, rights, privileges, grants and property of said Southern Trans-Continental Railway Company, and consolidated itself with the defendant Texas Company by sale, and the defendant Texas Company, in compliance with the terms and conditions
28 prescribed by said acts of Congress and by the laws of the State of Texas, and pursuant to the power and authority conferred upon it by said acts and laws, purchased and acquired by said indenture all said railroads, franchises, rights, privileges, grants and property ; and by virtue of the provisions of said acts of Congress and of said laws of Texas and of said sale, conveyance and consolidations, said railroads, franchises, rights, privileges, grants and property vested in and became absolutely the property of the defendant Texas Company.

29 IX. Your orator is informed and believes and therefore alleges that on and prior to the first day of May, 1872, Memphis, El Paso & Pacific Railroad Company, a corporation duly created by and existing under acts of the legislature of the State of Texas approved respectively on February 4, 1856, February 5, 1856, August 25, 1856, February 10, 1858, February 7, 1861 and March 20, 1861, and the laws of the State of Texas, owned, possessed and operated certain lines of railroad located in said State of Texas on the route prescribed for the defendant Texas Company in said acts of Congress, and by virtue of said acts and certain other laws of the State of Texas said Memphis, El
30 Paso & Pacific Railroad Company was authorized and empowered to issue bonds of the character of the income bonds and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about the first day of May, 1872, all the franchises, rights, grants and other property of said Memphis, El Paso & Pacific Railroad Company were sold under a decree of foreclosure to Enoch L. Fancher, as Trustee for certain bondholders of said
31 Memphis, El Paso & Pacific Railroad Company ; that in compliance with the terms and conditions prescribed by said acts of Congress and by the laws of the State of Texas, and pursuant to

the power and authority conferred upon it by said acts and laws, and also pursuant to an order of court duly made and entered on the twenty-second day of October, 1872, authorizing the sale by said Enoch L. Fancher and the receiver theretofore appointed in the suit for said foreclosure, of the franchises, rights, grants and other property of the Memphis, El Paso & Pacific Railroad Company to the defendant Texas
32 Company, the defendant Texas Company by indenture executed and delivered to it by said Fancher and said receiver on or about the twelfth day of June, 1873, purchased and acquired said property, rights, grants, privileges and franchises of said Memphis, El Paso & Pacific Railroad Company; and by virtue of the provisions of said acts of Congress and of said laws of Texas and of said sale and conveyance, all said property, rights, grants, privileges and franchises vested in and became absolutely the property of the defendant Texas Company.

33 X. Your orator is informed and believes and therefore alleges that on and prior to the twentieth day of June, 1881, the defendant New Orleans Company, a corporation organized and existing under the laws of the State of Louisiana, owned, possessed and operated certain lines of railroad, constructed and to be constructed, located in the State of Louisiana and connecting with the then lines of the defendant Texas Company and had purchased certain grants of land which had theretofore been made by an act or acts of the Congress of the United States to one or more other railroad companies.

34 That by virtue of the notarial charter of the defendant New Orleans Company (being an act passed before John G. Eustis, notary, at the City of New Orleans, June 29, 1875, and duly recorded), and by virtue of act No. 14 of the legislature of the State of Louisiana entitled "An Act To confirm the notarial charter of the New Orleans Pacific Railway Company; to extend the term of existence of said Company and to confer thereon certain powers and franchises" approved on or about February 19, 1876, and act No. 12 of the State of Louisiana entitled "An Act
35 to amend section eleventh of article three (3) of the Charter confirmed by Act number fourteen, eighteen hundred and seventy-six, entitled 'An Act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto; to extend the term of existence of said company, and to confer thereon certain powers,' and to empower said company to mortgage all its

future rights, properties and franchises to secure its bonds," approved on or about February 5, 1878, and by virtue of certain other laws of the State of Louisiana, the defendant New Orleans
36 Company was authorized and empowered to issue bonds of the character of the Income Bonds and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about the twentieth day of June, 1881, the defendant New Orleans Company, by Articles of Consolidation bearing that date, duly sold and conveyed to the defendant Texas Company all the railroads, rights, privileges, franchises and property of the defendant New Orleans Company other than certain land grants therein specifically excepted, and consolidated itself with the defendant Texas Compa[illegible] by sale; it being further provided in said
37 Articles of Consolidation that the franchises of the defendant New Orleans Company to be and remain a corporation was not to be impaired by said Articles; that the defendant Texas Company, in compliance with the terms and conditions prescribed by said acts of Congress and by the laws of the State of Louisiana, and pursuant to the authority conferred upon it by said acts and laws, purchased and acquired by said Articles of Consolidation said railroads, rights, privileges, franchises and property; and by virtue of the provisions of said acts of Congress and of said laws of
38 Louisiana and of said Articles of Consolidation, said railroads, rights, privileges, franchises and property, other than said land grants and franchises to be and remain a corporation, vested in and became absolutely the property of the defendant Texas Company.

XI. Your orator is informed and believes and therefore alleges that by virtue, among other things, of said acts of Congress, of said laws of the States of Texas and Louisiana, and of said pur-
39 chases, conveyances and consolidations aforesaid, the defendant Texas Company, at the time of the execution of its Second Mortgage hereinafter referred to, to-wit, on or about February 1, 1888, owned, possessed and operated certain lines of railroad extending from a point on the State line between the States of Louisiana and Texas, near Marshall, Texas, to Fort Worth, Texas, and known as the main line; also extending from Texarkana on the State Line between the States of Texas and Arkansas via Sherman, Texas, to a junction with the main line aforesaid at Fort Worth, Texas, and from Marshall, Texas, on said main line via Jefferson to said Texarkana; and extending from Fort Worth, Texas, to a junction
40 with the Southern Pacific Railway at Sierra Blanca, Texas,

together with the right to joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company, between Sierra Blanca and El Paso, Texas; and also extending from Shreveport, Louisiana, to Gouldsboro, Louisiana, opposite the City of New Orleans, including a branch to Baton Rouge, Louisiana, together with a leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad (otherwise known as the Vicksburg, Shreveport and Pacific Railroad), extending from
41 Shreveport in the State of Louisiana to a connection with said main line of the defendant Texas Company at the State line between Louisiana and Texas, and now owns and operates the same excepting said leasehold (in lieu of which leasehold the defendant Texas Company now owns and operates a substituted line of railroad from Waskom, Texas, via Reisor to Shreveport, Louisiana), and also then owned and operated, and now owns and operates, certain branches of said lines of road and possessed, and now possesses, certain other rights, property and lands in said States of
42 Louisiana and Texas, all of which said lines of railroad and property (except said substituted line) are more particularly described in the Second Mortgage of the defendant Texas Company hereinafter referred to; and the defendant Texas Company also owned, used and operated, and now owns, uses and operates, in and in connection with its regular railroad business certain rolling stock and equipment and other property, both real and personal, and rights, privileges and franchises appurtenant to or used in connection with its said lines of railroad; that the lines of railroad in the State of
43 Texas so owned by the defendant Texas Company at the date of the execution of said Second Mortgage aggregated approximately one thousand and thirty-nine miles in length, and the lines of railroad so owned by it in the State of Louisiana at said date aggregated approximately three hundred and thirty-six miles, making a total of approximately one thousand three hundred and seventy-five miles; and that the defendant Texas Company now owns and operates approximately one thousand and thirty-nine miles of railroad in the
44 State of Texas, approximately seven hundred and seventy-nine miles of railroad in the State of Louisiana, and approximately thirty-two miles of railroad in the State of Arkansas.

XII. Your orator is informed and believes and therefore alleges that on or about the first day of February, 1888, by virtue of the power and authority conferred upon it by said acts of Congress hereinabove mentioned and of the authority contained in said laws

of the States of Texas and Louisiana and for the purpose of retir-
45 ing and adjusting certain mortgage indebtedness of the defend-
ant Texas Company theretofore incurred, and pursuant to
lawful authority and due corporate action, the defendant
Texas Company duly authorized the creation and issue of its Second
Mortgage Income Bonds (hereinafter called the Income Bonds),
limited to the principal amount of Twenty-five million dollars
($25,000,000), to be payable December 1, 2000, and to bear interest
payable (subject to certain restrictions contained in the Second
Mortgage hereinafter mentioned) out of the net income of the de-
fendant Texas Company as the same might be determined by its
46 Board of Directors, at the rate of five per cent. per annum from
December 1, 1887, such interest being payable annually on the first
day of March in each year, the first payment, if any, to be due
March 1, 1889, provided that interest thereon should be payable to
the extent only that such net income, if any, should permit, and
that interest thereon should be non-cumulative.

XIII. Your orator is informed and believes and therefore
alleges that in order to secure equally the payment of the principal
47 and interest of the Income Bonds at any time outstanding in
accordance with the provisions thereof, and pursuant to
due corporate action on the part of the defendant
Texas Company and of the defendant New Orleans
Company, and for and in consideration of the premises and
of the sum of one dollar to the defendant Texas Company
and the defendant New Orleans Company duly paid by The Mer-
cantile Trust Company, a corporation duly organized and existing
under the laws of the State of New York, as Trustee, at or before
the ensealing and delivery of said mortgage, and for other valuable
considerations, the defendant Texas Company, acting in pursuance
48 of due authority conferred upon it by said acts of Congress and
said laws of the States of Texas and Louisiana, and the defend-
ant New Orleans Company, acting in pursuance of due
authority conferred upon it by said laws of the State of
Louisiana, did, on or about February 1, 1888, duly make and exe-
cute under their respective corporate seals and deliver to said The
Mercantile Trust Company, as Trustee, a mortgage or deed of trust,
dated February 1, 1888 (hereinafter called the Second Mortgage), a
copy whereof is hereto annexed marked Exhibit A and made a part
hereof, wherein and whereby the defendant Texas Company and
49 the defendant New Orleans Company granted, bargained, sold,

aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, mortgaged, hypothecated and affected unto said The Mercantile Trust Company, as Trustee, and its successors and assigns, all and singular the railroads, property, franchises, rights and privileges of the defendant Texas Company, and of the defendant New Orleans Company, more particularly described in said Second Mortgage as follows:

50 "All of the Texas and Pacific Railway Company's line of Railway, extending from a point on the State line between the States of Louisiana and Texas westwardly to Marshall and from Marshall by way of Dallas to Fort Worth, in the State of Texas; and from Texarkana on the State line between Texas and Arkansas, to its junction via Clarksville, Paris, Bonham, Sherman, and Whitesboro with the main line aforesaid at Fort Worth; and from Marshall aforesaid through the town of Jefferson to its junction at or near Texarkana, with the said line from Texarkana to Fort Worth; and from Fort Worth aforesaid to a Junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El
51 Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument, upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport
52 to Gouldsboro, including said branch, being about three hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana

and Texas Railroad and Steamship Company by deed of February 15th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions and improvements constructed during the receivership under the proceedings instituted in the Circuit Court of the United States for the Fifth Circuit; also the right, title, and interest of the said Railway Company of, in, and to the Gordon Coal Mine and lands connected therewith in Palo Pinto county, Texas, and the spur of railroad of about six miles leading to said mine; also all of the terminal properties in Westwego, Gouldsboro and New Orleans, described as follows:

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas
53 and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof; for greater certainty, said property is described as follows:

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the First District of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans Cotton Press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the First District in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing the whole of the square bounded as
54 above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the First District on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the Sixth District of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans Park. All said property is more fully described in said deed of said Dodge hereunto referred to, and made part

hereof, and forms part of the terminals of said railway in New Orleans.

55 6. Also the thirty-eight lots, squares and portions of ground, with all buildings thereon, situated in the town of Gouldsboro, formerly McDonoughville, in the Parish of Jefferson, State of Louisiana, on the right bank of the Mississippi river, as set forth and described in a certain deed from G. M. Dodge to the Texas and Pacific Railway Company, dated 27th June, 1883, and recorded in said Parish, August 13th, 1883, in Conveyance-book P, folios 495 to 502, inclusive, hereby referred to and made part hereof, and described as therein shown and being in the yard limits and forming part of the terminals of said railway on the right bank of said river.

7. Also lots 14 and 15 in square 37, bounded by Adams, Jefferson, Copernicus, and American streets, in the town of Gouldsboro, described in a certain deed dated July 21st, 1883, from Thomas Carr to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folio 481, and hereby made part hereof, and forming part of said
56 last-named terminals in said limits.

8. Also square of ground No. 52 in the town of Gouldsboro, bounded by Jefferson, Madison, Potolemy, and Lawrence streets, containing twelve lots described in a certain deed dated January 26th, 1883, from Pierre Nougue to the Texas and Pacific Railway Company, duly registered in Book B, New Orleans, 116, folio 732; in Jefferson Book B, folio 280, 281, which deed is referred to for greater certainty and made part hereof, and forming part of said last-named terminals in said limits.

9. Also five certain lots of ground situated on the right bank of the Mississippi river opposite New Orleans, in the town of Gouldsboro, in square No. 14, bounded by Adams, Copernicus, Americus streets, and the Levee, as described in a deed dated 9th December, 1882, from Louis Schwartz to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folios 232 and 233, and made part hereof for greater certainty, and forming part of said last-
57 named terminals.

Also the lot on the actual corner of Front and Terpsichore streets, in the city of New Orleans, having forty-seven feet front on Front street, more or less, and extending to the Mississippi river, the legal line of Terpsichore street being its northerly boundary, and with the riparian rights, and forming part of the terminals of the Railway Company in New Orleans.

Also all and singular that certain tract and parcel of land situate in the parish of Jefferson, in the State of Louisiana, on the right bank of the Mississippi river, which

was sold and conveyed to the New Orleans Pacific Railway Company by the Morgan's Louisiana and Texas Railroad and Steamship Company, by deed dated the fifteenth day of February, 1881, with other property, for the consideration of $745,110.42, which said deed is duly recorded in Book of Conveyances N. 32, folio 199, &c., Parish of Ascension, on the seventeenth day of February, 1881, and which land, comprising about one hundred and seventy-three acres, more or less, forms part of the terminals of said railway at Westwego. Also the tract of land of eighty acres, more or less, at
58 Wheelock, parish of Iberville, forming relay station. Also the transfer steamer "Gouldsboro," at New Orleans, her tackle, apparel, furniture, and machinery, and the new transfer boat now being built at New Orleans. Also all the rights, privileges, and franchises conferred by the city of New Orleans and other municipal corporations on the New Orleans Pacific Railway Company and its assigns, the Texas and Pacific Railway Company, by ordinance or grant.

Also all and singular the terminal properties and facilities, and their appurtenances, situated in Westwego, Gouldsboro, and New Orleans, and now in the possession and use of the said Texas and Pacific Railway Company in the conduct and operation of its road and the transaction of its business, whether acquired by donation, purchase or expropriation, including steamboats, warehouses, and docks; and including and intending to include in these presents the road-bed and superstructure and the right of way of said rail-
59 road, rails, tracks, side tracks, bridges, viaducts, buildings, depots, station-houses, car-houses, engine-houses, shops, warehouses, turntables, water-stations, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind thereunto belonging or in anywise appertaining, or which have been or may be acquired or provided for use upon or in connection with the said railroad; and all lands acquired or designed for depots, warehouses, and all other structures at either terminus, as well as along the line of said road; and also all gravel pits and sand pits at any time heretofore acquired for the use of said road, all the locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels, now or hereafter belonging or appertaining to said railroad, and all property, both real and personal, of every kind and description which shall hereafter be acquired for use upon or in connection with, or for the purposes of the said railroad, and whether acquired heretofore or hereafter
60 by said Railway Company or its Receivers; and all the corporate rights, privileges, and franchises which the said Railway Companies, or either of them, have and can ex-

ercise or shall hereafter acquire or possess, of, in, to, upon, or in respect of the said railroad, or any part thereof, or necessary for the construction, maintenance, or operation of said railroad between said points, or anything belonging or appertaining, or which may hereafter belong or appertain to the same, or any part thereof, and all the rents, issues, profits, tolls, and other income of the said railroad, and all the rights, privileges and franchises whatsoever which the said Railway Companies now possess, own, or are entitled to, and all rights, privileges, and franchises, properties real and personal, and rights and things which the said Railway Companies may or shall acquire, possess or become entitled to for the purposes of or in connection with the said railway, or in the operation, use, and maintenance thereof, and all the corporate and other franchises of the said railway companies, including their franchises to be corporations. Including all the franchises,
61 rights, privileges, and property acquired from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Vicksburg, Shreveport and Texas Railroad Company, and the New Orleans Pacific Railway Company."

XIV. All of the above-described premises, railroads, property, rights, franchises and appurtenances were in and by said Second Mortgage granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, set over, mortgaged, hypothecated and affected to said The Mercantile Trust Company, as Trustee, and its lawful successors or successor, heirs, executors,
62 administrators and assigns forever, to and for the only proper use and behoof of said The Mercantile Trust Company, as Trustee, and its successors or successor, heirs, executors, administrators and assigns forever, subject, however, to the "First Mortgage" or deed of trust to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Trustee, bearing even date with said Second Mortgage, to secure bonds, amounting to $25,000,000, and to the payment of all the bonds issued or to be issued thereunder,
63 as well as the School Fund Loan and the mortgage on the Eastern Division in said "First Mortgage" referred to; and also subject to the right of the defendant Texas Company, with the assent of two-thirds of the members of its Board of Directors, to protect its business by the construction or acquisition of branch or connecting lines, and to mortgage the branches so constructed or acquired at a rate not exceeding $12,500 a mile, and at a rate of interest not exceeding five per cent. per annum, or

to assume existing mortgages of no greater amount per mile or rate of interest on branch or connecting lines, and to contract that
64 the amount required to pay the interest upon the bonds so issued or assumed should be made a rental charge, and in case of any deficiency in the earnings of said branch lines to meet such rental charge, that the same should be made up out of the earnings of the lines of railway and property mortgaged under the Second Mortgage and before payment of interest on the Second Mortgage, the sum necessary to meet such deficiency to be a charge upon the income of the defendant Texas Company prior to the interest upon the Income Bonds; but in trust, nevertheless, for the equal *pro*
65 *rata* benefit and security of all and every the persons, firms, or corporations who might be or become holders of the Income Bonds issued under and secured by the Second Mortgage without preference, priority, or distinction as to lien or otherwise of any one over the others, by reason of priority in time of issuing or negotiating the same, and so that each and all of the Income Bonds, issued and to be issued as aforesaid, should have the same right, lien and privilege under and by the Second Mortgage, and should all be equally secured
66 thereby, with like effect as if they had all been made, executed, delivered, and negotiated simultaneously on the date of the execution and delivery thereof, it being intended that the lien and security of all of said bonds should take effect from the date of the execution and delivery of the Second Mortgage, whether the same should actually be sold or disposed of at such date, or whether they or any part of them should be negotiated and sold at some future date, and that the lien and security of the Second Mortgage, and all the Income Bonds that might be issued under the same, should take effect from the date of the execution and delivery of the
67 Second Mortgage as though actually sold and delivered to and in the hands of innocent holders for value upon such date and the lien and security of the Income Bonds should in no manner be altered, impaired, or prejudiced by the creation of subsequent mortgages by the defendant Texas Company or by the entry or acquisition of judgments or liens in any form by creditors at any future time.

XV. Your orator is informed and believes and therefore alleges that subsequently to the execution and delivery of the Second
68 Mortgage, the same was duly filed and recorded in the Department of the Interior of the United States of America and was duly re-

corded in each county of the State of Texas and each Parish of the State of Louisiana in which the lines of railroad and property of the defendant Texas Company and the defendant New Orleans Company covered by said mortgage are situated or located.

XVI. That said The Mercantile Trust Company duly accepted the trusts created by the Second Mortgage and united in the execution thereof to evidence such acceptance; that thereafter and
69 on or about the tenth day of August, 1911, said The Mercantile Trust Company, pursuant to proceedings duly and regularly taken and had, in compliance with the provisions of the statutes of the State of New York applicable thereto, became merged into your orator, Bankers Trust Company, which thereupon and thereby became and is now duly, lawfully, fully and entirely vested with all the rights, property, duties, powers, trusts, relations and obligations of said The Mercantile Trust Company, including all rights, property, duties, powers, trusts, relations and obligations of said
70 The Mercantile Trust Company, as Trustee, under the Second Mortgage.

XVII. Your orator is informed and believes and therefore alleges that the Second Mortgage was and is the proper act and deed of the defendant Texas Company and of the defendant New Orleans Company, and was by said defendants and each of them authorized, made and delivered in all respects in conformity with law; and that said mortgage was and is a valid conveyance for the purposes therein stated and now constitutes a valid and subsisting lien upon
71 all the property and franchises therein mentioned, as hereinbefore set forth, and upon other property and franchises which have become subject to the lien of said mortgage.

XVIII. Your orator is informed and believes and therefore alleges that since the date of the execution and delivery of the Second Mortgage, the defendant Texas Company has from time to time acquired certain other property, real and personal, rights and interests (the exact character, description and extent of which are at present unknown to your orator) which have become subject to the
72 lien of the Second Mortgage, and that for the proper protection and enforcement of the rights of your orator and of the holders of the Income Bonds, it is necessary for the defendant Texas Company to account to your orator in this suit for all property, rights and interests owned by the defendant Texas Company at the date of the execution and delivery of the Second Mortgage, and for all property, rights and

interests subsequently acquired by the defendant Texas Company, in order that said property, rights and interests or so much thereof as is subject to the lien of the Second Mortgage may be so declared
73 and decreed by this Honorable Court.

XIX. From time to time subsequently to the execution and delivery of the Second Mortgage and prior to the date of the filing of this bill, your orator's predecessor, said The Mercantile Trust Company, as Trustee under the Second Mortgage, duly authenticated $25,000,000 face value of the Income Bonds, which bonds as your orator is informed and believes had been theretofore duly executed
74 by the defendant Texas Company pursuant to authority of law and due corporate action, and thereupon each and all of said bonds were duly delivered to the defendant Texas Company pursuant to the terms of the Second Mortgage. Your orator is informed and believes and therefore alleges that all of said Twenty-five million dollars ($25,000,000) face value of the Income Bonds have been duly issued by the defendant Texas Company, and are now outstanding in the hands of *bona fide* holders for value and are the lawfully created, valid and existing obligations of the defendant Texas Company.

75 XX. The Second Mortgage (Exhibit A), in and by various articles thereof, provides among other things as follows (the railway company therein sometimes referred to as the "Railway Company" or "said Company" being the defendant Texas Company), viz.:

> "ARTICLE ONE.—The bonds to be issued under and secured by these presents, hereinafter designated as Second Mortgage Bonds, shall not exceed in the aggregate $25,000,000; and whereas, The Bonds to be issued under and secured by this mortgage, or so many thereof as shall be necessary, are together with certain bonds to be issued under the first mortgage of contemporaneous date herewith to be used for
> 76 the purpose of exchanging into the bonds of the Railway Company and of the New Orleans Pacific Railway Company which have been deposited under the said Plan of Reorganization and secured by the mortgage of the Railway Companies known as the Eastern Division Consolidated Mortgage, the New Orleans Pacific Division Mortgage, the Rio Grande Division Mortgage, and the General and Terminal Mortgage, and of settling with the holders of the Land Grant Bonds, and it may be unadvisable or impracticable to secure the immediate satisfaction or release of the said mortgages, it is further covenanted and agreed that the bonds issued under the said several mortgages, and deposited under the said

plan, shall be transferred and delivered to the trustee of the first mortgage to be held as security for the bonds to be issued under this present indenture of mortgage and a first mortgage to be issued by the Railway Company cotemporaneously herewith, until the said mortgages shall have been satisfied, or, in the judgment of the trustee of the first mort-
77 gage, it is prudent to cause the bonds so transferred and delivered to be cancelled.

ARTICLE TWO.—Until default shall be made by the said Texas and Pacific Railway Company, its successors or assigns, in the due and punctual observance and performance of any one or more of the covenants and agreements herein contained, on the part and behalf of said Railway Company, its successors and assigns, to be kept and performed; the said Railway Company, its successors and assigns, shall be suffered and permitted to have the actual possession of the railway property and premises hereinbefore described, and of the whole thereof, to use and employ the same and every part thereof, and to exercise and enjoy all the rights and franchises appertaining thereto, and to collect, receive, and use the tolls, incomes, rents, issues, and profits thereof, in any manner, which will not impair the lien created by these presents.

78 ARTICLE THREE.—And the said Texas and Pacific Railway Company, in consideration of the premises, covenants, promises, and agrees:

I. That having possession, as aforesaid, it shall and will well and truly pay off and discharge, or cause to be paid off and discharged, each and every tax, assessment, or other liability and governmental charge, which may, from time to time, be lawfully levied or imposed by competent authority upon the said railway property and premises or upon any part thereof, the lien whereof might or could be held to be superior to the lien of these presents, and also the interest which from time to time may become due and payable upon any bonds, the payment of which is secured by a mortgage prior in lien to these presents, and the principal of said bonds as and when the same shall mature, so that the security of the bonds issued herewith shall at all times be duly maintained and preserved.

II. That having possession, as aforesaid, it shall and
79 will at all times maintain in full quantity, number, and efficiency and keep insured its rolling stock, tools and machinery, buildings, bridges or other structures, erected or to be erected on the premises, and all other property provided for use in connection with the railway herein described, usually insured by railway companies, and in the same manner and to the same extent, and simultaneously with the execution hereof it will furnish to the Trustee a

full and complete inventory or schedule of said rolling stock and equipment.

III. That having possession, as aforesaid, it shall and will diligently preserve all the rights and franchises to it granted and upon it conferred by the acts of Congress, appertaining to the railway property and premises subject to the lien hereof and otherwise, and whenever necessary or advisable comply with the laws of any State wherein the routes aforesaid, or any it may hereafter acquire the right to construct its road on or any part thereof, may now or shall at any time hereafter be situate, in such manner and form as counsel learned in the law shall advise, with a view to effect-
80 ually preserve, obtain or secure the corporate rights and franchises, enabling it to locate, construct, use, operate and maintain the said railway line or lines whereon these presents shall constitute a lien throughout the whole extent thereof, and charge tolls thereon for the transportation of passengers and freights, and that using and operating the said Railway as the same was heretofore constructed, or as the same or any section or part thereof shall hereafter be constructed and completed, ready for use and operation, it shall and will, at all times, maintain, preserve, and keep the same, and every part thereof, with the rolling stock, fixtures, and appurtenances, and every part and parcel thereof, in thorough repair and working order, at least equal to its present condition in respect to the road-bed, ties, and rails, motive power, rolling stock and equipment, and fully supplied with suitable and sufficient motive power, rolling stock, and equip-
81 ment, and shall and will, from time to time, make all needful and proper repairs, renewals and replacements, useful alterations, additions, betterments and improvements, so as to maintain the same in proper order and in complete repair and good working condition, so that the traffic and business of the said road and of every part thereof shall at all times be done with safety and expedition.

* * * * * * *

V. That it shall and will well and truly pay, or cause to be paid, to the holders of the Second Mortgage Bonds to be issued hereunder, as hereinbefore stated, or of such of the said Second Mortgage Bonds as shall from time to time be outstanding and secured hereby, and every one of them, the principal thereof, according to the true intent and meaning thereof, and pay interest on said principal sum up to the rate of five per cent. per annum from December 1st, 1887, payable annually on the first day of March in each year, the first payment, if any, to be due March 1st, 1889, in like gold coin out of the net income of the Railway Company, as the same
82 may be determined by the board of directors of the Railway Company. If the income of the Railway Company applica-

ble for the interest on said bonds shall not, in the judgment of the board of directors, be sufficient to pay the said interest in full, such interest or so much as shall remain unpaid shall not accumulate, and all payments both of principal and interest shall be without deduction from either said principal or interest for any tax or taxes which, by any present or future laws of the United States or the States of Texas and Louisiana, may be payable for or in respect of the said principal or interest for national, State, or municipal purposes; the Railway Company hereby agreeing to pay any such tax or taxes which it may now or hereafter be required by any such law to retain therefrom. 85

And in case of default of such payment by said Texas and Pacific Railway Company, from any cause whatever, the Railway Companies for the consideration in said Second 83 Mortgage Bonds mentioned, further hereby covenant, promise, and agree that they shall not and will not at any time hereafter insist on or plead in any manner whatever, claim or take the benefit or advantage of any stay or extension law, 86 which may now or at any time hereafter be in force, in any locality where the railway property and premises hereby conveyed or intended so to be, or any part thereof, may or shall be situate; or claim, take, or insist on the benefit or advantage to be derived from any law, now or hereafter in force, as aforesaid, providing for the valuation or appraisement of said railway property or premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to the provisions hereinafter contained or the decree of any court of competent jurisdiction; or after any such sale or sales, claim or exercise any right which they may now or hereafter have, by statute enacted by the legislature of the State of Texas or Louisiana, or other State wherein the said Railway property or premises, or any part thereof shall or may be situate, to redeem the property so sold, or any part thereof; and said Railway 84 Companies hereby expressly waive all benefit and advantage that they might or could derive by virtue of any such law or laws and agree not to hinder, delay, or impede the execution by said Trustee of the powers of entry and sale hereinafter 87 conferred upon, granted, and delegated to it, but to suffer and permit the execution of such powers, as if such law or laws had not been made or enacted.

VI. Further, that at all times until said Second Mortgage Bonds, with interest, shall be fully paid, the Railway Company will permit the Trustee, its agents, clerks, or attorneys, for that purpose to be duly authorized, fully to inspect all the books of account of the Railway Company, together with its books, reports, memoranda, or other papers, and to take

such extracts therefrom as may be deemed expedient to fully report thereon, with convenient details. And further, that if at any time the net income of the road hereinbefore conveyed
85 properly applicable to the payment of the interest on the outstanding bonds hereby secured shall be insufficient for such payment, the Railway Company will, without delay, furnish to the Trustee full and detailed accounts and statements of the gross earnings and receipts of said road, and of all the expenses, disbursements, and deductions out of or charged against the same during the period in which there shall be such deficiency.

* * * * * * *

ARTICLE FOUR.—In case default shall be made by said Railway Company on or after March 1st, 1892, in the payment of full interest at the rate of five per cent. per annum on any of the Second Mortgage Bonds which may at any time have been issued and be then outstanding and secured by these presents or in case default shall be made by said Railway Company in the payment of the principal or any of such bonds when and as the same, according to the terms
86 thereof, shall mature; or in case default shall be made by said Railway Company in the payment of any tax, assessment, or other governmental charge lawfully levied and imposed upon the said railway property and premises, or any part thereof, or any other prior lien, and such default shall continue for the period of three months after such tax, assessment, or other governmental charge or lien shall have become due and payable; or in case said Railway Company, shall make default in the due observance and performance of its covenant of further assurance, or any other of its covenants, promises and agreements herein contained, and either of such defaults continue for the period of three months; then and in each and every such case of default continued as aforesaid, on the request of holders of not less than one-third of the bonds outstanding the said Trustee shall personally, or by its agent or agents, attorney or attorneys, enter into and upon all and singular the railway property and premises, lands, rights, interests and franchises hereby conveyed or intended so to be, and each and every part thereof, and exclude the said
87 Railway Company, its agents and servants wholly therefrom, and having and holding the same, use and operate, manage and control said railway, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, and servants or attorneys, to the best advantage of the interests as well of the public as of the holders of Second Mortgage Bonds secured hereby in accordance with law and any statute relating to said railway

or any part thereof, or to the operation thereof; and upon such entry it shall be lawful for the said Trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railway, and whereof it shall become possessed as aforesaid in the same manner and to the same extent as is usual with railway companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and replacements, and useful alterations, additions,
88 betterments, and improvements thereto and thereon, as well in respect of the rolling stock or equipment as in respect of the railway and appurtenances and other subject-matters as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railway and conducting the business thereof and of all repairs, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents, clerks, servants, and other employes by it properly engaged and employed, the said Trustees shall apply the moneys arising as aforesaid, to the payment of the interest which shall be due and payable on the bonds outstanding
89 and secured hereby, in the order in which such interest shall become due, ratably to the persons or parties entitled to receive the same: *Provided, however*, That the holders of a majority of the said bonds may appoint a committee to direct and supervise the management of the property by said Trustee, which committee shall have such powers, control, and supervision, as are or may be conferred upon and exercised by the board of directors of the Railway Company.

ARTICLE FIVE.—There shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage, but in case default shall be made by the said Company in the payment of the principal of any of the said Second Mortgage Bonds, when the same shall become and be due as therein or hereinbefore provided, and in each such case of default it shall be lawful for the said Trustee, after entry as aforesaid, or other entry, or without any entry, personally or by its attorneys or
90 attorney, agents or agent, to sell and dispose of all and singular the railway property and premises, rights, franchises and interests, lands and appurtenances, hereby conveyed or

intended so to be, or from time to time as they shall deem proper, of so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay the amount due on such bonds then outstanding, for principal and interest, according to the terms thereof, together with the costs and expenses of such sale, and of all right, title and interest, claim and demand whatsoever, benefit, equity or redemption, and statutory right to redeem of the said Company, its successors and assigns, of, in, and to the same, or so much thereof as may be sold, and every part thereof, at public auction at such place in the city of New Orleans, or on the premises or any part thereof, and at such time and upon such terms as may be specified in the notice of sale to be given as hereinafter provided, for the highest and best price the same will bring in cash.

91 Preparatory to such sale the said Trustee shall give notice of the time and place, when and where, and the terms upon which, the same is to be made, and containing a description of the property to be sold, by advertisement thereof in one newspaper at that time published in each of the cities of New Orleans, Philadelphia, and New York, and in the State of Texas, once a week for six successive weeks; and upon any sale or sales under this instrument the said Trustee is hereby empowered to make, execute, and deliver to the purchaser or purchasers at any such sale a good and sufficient deed, or good and sufficient deeds of conveyance, for the railway property and franchises sold. In case of any sale or sales by virtue of any of the provisions of this instrument, the said company hereby expressly and absolutely agrees to waive, and hereby irrevocably waives, the benefit or advantage of any and all valuation, stay, appraisement or extension laws, and any statutory right to redeem, now existing, or which
92 may hereafter be in force in the State or States wherein the property to be sold under this instrument or any part thereof may at the time of the sale be situate, or where the sale may take place, which, but for this provision, agreement and waiver, might be operative, in respect of any such sale, or might be availed of to prevent or postpone an absolute or immediate sale under the provisions of this instrument, or to redeem after any sale the property sold thereat, or any part thereof; and it is likewise expressly declared that any sale or sales made by said Trustee, under or by virtue of this instrument, when completed, shall operate to divest all title, rights and interest, claims and demands whatsoever both at law and in equity of said Railway Companies of, in, and to the rights, property, powers, privileges, and franchises sold, and shall be a perpetual bar both at law and in equity against the said

Railway Companies, their successors and assigns, and any and all persons whomsoever claiming or to claim the rail-
road property, rights, powers, privileges, and franchises sold,
93 or any part or parcel thereof, by, from, through, or under the said Railway Companies, its successors and assigns, or any of them. And the said Trustee shall apply the proceeds or avails of any sale to be made under the provisions of this instrument, and the purchase money paid thereon, after deducting therefrom just allowances for all expenses connected therewith, including attorney and counsel fees, as well as any and all advances, expenses and liabilities which may have been made or incurred by said Trustee in using, operating, maintaining, and preserving said railroad property and premises, or in carrying on and managing the business for the period the same may have been in the said Trustee's possession, or in arranging for making and completing the sale and payments for taxes, assessments, or other charges or liens prior to the lien of these presents, if any such there shall then be, and the said railway property and premises, or any part thereof, shall not have been sold subject thereto, as well as just and reasonable compensation for the said Trustee's own services, to the payment
94 of the principal of such of said bonds as may be at that time outstanding, and of the interest which shall have accrued upon the said principal up to that time, according to the tenor thereof, without discrimination or preference as between principal and interest, but ratably, to the aggregate amount of such principal and accrued interest; it being understood and hereby declared and agreed, that such payment shall be made to the persons holding the bonds evidencing the right to such principal and interest, without discrimination or preference between them on account of the time of the actual issue of said bonds, and, if after payment in full of all the said bonds, principal and interest, a surplus of the said proceeds of sale shall remain, the said Trustee shall pay over such surplus to the said Railway Company, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

And it is hereby declared and agreed that the said
95 Trustee may, from time to time, adjourn any sale to be made under the provisions of this instrument, by announcement made at the time and place appointed for such sale, and if so adjourning such sale, may make the same at the time and place to which the same shall be so adjourned, and without further notice thereof.

And it is further declared and agreed that the receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers of the property, which shall be sold as aforesaid for his or their purchase money, and that such pur-

chaser or purchasers, his or their heirs, executors, or administrators, shall not, after paying such purchase money and receiving such receipt, be liable to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of any such purchase-money, or any part thereof.

96 And it is further agreed that no part of the premises hereby mortgaged or intended so to be shall be sold under proceedings at law, by the holder or holders of all or any of the bonds intended to be hereby secured, it being the intention and agreement of the parties for the better securing the largest possible price for the mortgaged premises in the event of a sale thereof, that the same shall only be sold in the manner herein provided or under proper proceedings in a Court of Equity for the foreclosure of this mortgage.

97 ARTICLE SIX.—It is hereby mutually agreed, that at any public sale of the railway property, premises, rights, privileges, and franchises hereinbefore conveyed, made by virtue of the powers herein granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the Trustee, under these presents for the time being may, in its discretion and not otherwise, bid for, and if the same be obtainable at the price hereafter mentioned, purchase and acquire the property so offered for sale, in behalf of all the holders of bonds secured by this instrument, which shall then be outstanding, in proportion to the amount of said bonds by them respectively held: *Provided, however*, That nothing herein contained shall authorize the said Trustee to bid, on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, according to the tenor thereof, and the costs and expenses of such sale for the entire property then held upon the trusts of this indenture, or any amount

98 reasonably proportionate thereto, for any part of said property.

And it is further agreed, that the Second Mortgage Bonds shall be received in payment of the purchase-money of any property sold by virtue hereof, as equivalent to so much cash of the said purchase-money as would be distributed and payable thereon.

ARTICLE SEVEN.—Upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the Trustee and of the bondholders under these presents, the said Trustee shall be entitled to exercise the right of entry herein conferred, or to the appointment by any court of competent jurisdiction of a receiver or receivers of the property hereby mortgaged, or of the earnings, rev-

enue, rents, issues, or profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

* * * * * * *

99 ARTICLE ELEVEN:—If the said company shall well and truly pay or cause to be paid all bonds to be issued under or entitled to the protection of this deed of trust, and the coupons attached thereto, at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of these presents, then, and in that case, all property, rights and interests hereby conveyed shall revert to the said Company, and the estate, right, title and interest of the said Trustee aforesaid, shall thereupn cease, determine, and become void; otherwise the same shall be, continue, and remain in full force and virtue."

* * * * * * *

100 XXI. Your orator is informed and believes and therefore alleges that subsequently to the first day of December, 1887 (the date from which interest on the Income Bonds commenced to accrue), and prior to the date of the filing of this bill, the defendant Texas Company received during each annual interest period of the Income Bonds ended December first, large amounts of income remaining after the payment of its total operating expenses, the exact amounts of which are unknown to your orator; that in the annual reports of the Board of Directors of the defendant Texas Company
101 to the Stockholders of the defendant Texas Company such income remaining after the payment of all operating expenses is shown for annual periods ended December 31 for the years 1888 to 1911, both inclusive, and for annual periods ended June 30 for the years 1911–1915, inclusive; that the amounts of such income so remaining for said several periods as shown by said annual reports are as follows :

	Year Ended December 31, 1888	$ 1,576,866.21
	Year Ended December 31, 1889	2,023,769.85
	Year Ended December 31, 1890	1,806,521.93
	Year Ended December 31, 1891	1,797,020.30
102	Year Ended December 31, 1892	1,618,677.61
	Year Ended December 31, 1893	2,234,140.22
	Year Ended December 31, 1894	2,134,593.19
	Year Ended December 31, 1895	1,913,195.48
	Year Ended December 31, 1896	1,777,183.01
	Year Ended December 31, 1897	2,324,837.86
	Year Ended December 31, 1898	2,515,712.29
	Year Ended December 31, 1899	2,581,894.86
	Year Ended December 31, 1900	3,358,667.93
	Year Ended December 31, 1901	4,098,626.29
	Year Ended December 31, 1902	3,632,141.39
	Year Ended December 31, 1903	3,980,123.58
	Year Ended December 31, 1904	4,383,199.21
	Year Ended December 31, 1905	4,504,387.29
	Year Ended December 31, 1906	5,115,702.46
	Year Ended December 31, 1907	5,204,280.91
	Year Ended December 31, 1908	3,756,324.94
	Year Ended December 31, 1909	4,109,568.39
	Year Ended December 31, 1910	4,210,024.06
	Year Ended December 31, 1911	4,141,739.04
103	Year Ended June 30, 1912	3,828,117.74
	Year Ended June 30, 1913	3,443,912.17
	Year Ended June 30, 1914	4,525,002.55
	Year Ended June 30, 1915	4,371,122.71
	* Total	$90,967,353.47

that from December 1, 1887, to December 1, 1915, the amount of income so remaining received by the defendant Texas Company during each annual interest period ended December 1 was equal to or in excess of the amount shown in the above tabulation as received by the defendant Texas Company during the annual period ended December 31 or June 30, as the case may be, of the same calendar
104 year; and that since December 1, 1915, and prior to the date of the filing of this bill the defendant Texas Company has received a large amount of income remaining after the payment of all operating expenses, the exact amount of which is unknown to your orator.

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* From this amount should be deducted the amount of income so remaining received for the six months from July 1 to December 31, 1911, which is shown twice in the above tabulation.

XXII. That subsequently to the execution and delivery of the Second Mortgage and prior to the date of the filing of this bill no interest was paid to the holders of any of the Income Bonds except as follows:

Date of Payment	Out of Net Income for Year Ended	Per Cent. on Outstanding Bonds	Amount
March 1, 1900	Dec. 1, 1899	1½%	$ 375,000.00
March 1, 1901	Dec. 1, 1900	4%	929,520.00
March 1, 1902	Dec. 1, 1901	5%	1,161,900.00
March 1, 1903	Dec. 1, 1902	5%	1,161,900.00
March 1, 1904	Dec. 1, 1903	5%	1,233,806.25
March 1, 1905	Dec. 1, 1904	5%	1,233,806.25
March 1, 1906	Dec. 1, 1905	5%	1,233,806.25
March 1, 1907	Dec. 1, 1906	5%	1,233,806.25
March 1, 1908	Dec. 1, 1907	3½%	863,664.00
Total			$9,427,209.00

XXIII. Your orator is informed and believes and therefore alleges that at the expiration of each of said annual interest periods of the Income Bonds for the years mentioned below there remained in the possession of the defendant Texas Company out of said income after payment of all expenditures charged thereagainst, a surplus consisting of large sums of money, the exact amount of which is unknown to your orator; that in said annual reports of the Board of Directors of the defendant Texas Company is shown the amount of said surplus remaining in the possession of the defendant Texas Company at the expiration of each annual period ended December 31 for the years mentioned below prior to and including the year ended December 31, 1911, and of each annual period ended June 30 for the years thereafter mentioned below; that the respective amounts of said surplus for said annual periods shown by said annual reports are as follows:

Year Ended December 31, 1888	$ 182,724.93
Year Ended December 31, 1889	287,334.32
Year Ended December 31, 1891	33,019.80
Year Ended December 31, 1893	527,097.43
Year Ended December 31, 1894	268,335.94
Year Ended December 31, 1895	154,971.83
Year Ended December 31, 1897	447,969.15
Year Ended December 31, 1898	31,152.64
Year Ended December 31, 1899	446,982.84
Year Ended December 31, 1900	1,137,277.70
108 Year Ended December 31, 1901	1,486,977.41
Year Ended December 31, 1902	1,718,102.30
Year Ended December 31, 1903	938,722.33
Year Ended December 31, 1904	1,158,739.43
Year Ended December 31, 1905	1,203,042.51
Year Ended December 31, 1906	1,564,243.17
Year Ended December 31, 1907	603,813.74
Year Ended December 31, 1908	265,014.98
Year Ended December 31, 1909	688,362.76
Year Ended December 31, 1910	447,378.06
Year Ended December 31, 1911	186,975.65
Year Ended June 30, 1914	377,778.55
Year Ended June 30, 1915	252,052.57
	$14,408,070.04;

that on the first day of December preceding each 31st day of December or succeeding each 30th day of June, as the case may be, in this paragraph XXIII above mentioned, there remained in the possession of the defendant Texas Company a surplus, computed by
109 making like deductions as are made in such annual report for the corresponding year, equal to or in excess of the surplus reported as aforesaid for the year ended on the 31st day of December or the 30th day of June of such year, as the case may be; that for none of said years ended December 1 was any payment made to any of the holders of the Income Bonds other than the amounts aggregating $9,427,209.00 specified in paragraph XXII hereof; and that, excepting (*a*) the sums of $375,000 and $929,520 out of such surpluses in respect of the years ended December 31, 1899 and December 31, 1900, said sums respectively having been paid as interest out of net income for the years ended December 1,

110 1899, and December 1, 1900, as aforesaid, and (*b*) said surpluses for the years ended December 31, 1901 to 1907, both inclusive, full interest at the rate of five per cent. per annum having been paid on the Income Bonds for the years ended December 1, 1901 to 1906, both inclusive, and interest in excess of such surplus shown by said annual reports for the year ended December 31, 1907, having been paid on the Income Bonds out of net income for the year ended December 1, 1907, and (*c*) said surplus of $252,052.57 shown for the year ended June 30, 1915, the aggregate amounts of surpluses shown as aforesaid for the several
111 years in this paragraph XXIII above specified ended December 31 or June 30, as the case may be, amounted to $4,177,856.58, and that the aggregate amount of such surpluses, with like exceptions, for the annual interest periods ended December 1 in the calendar years mentioned in this paragraph was equal to, or in excess of, said sum of $4,177,856.58.

XXIV. Your orator is informed and believes and therefore alleges that all of said surplus sums aggregating $4,177,856.58 hereinabove in paragraph XXIII hereof mentioned were and are properly applicable to the payment of interest on the Income Bonds in accordance with the terms of the Second Mortgage ; that no part of
112 said surplus sums has been applied to the payment of the interest on the Income Bonds, and that the Board of Directors of the defendant Texas Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds neglected and refused to determine that said surplus sums were net income applicable to the payment of interest on the Income Bonds, and wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds determined that said surplus sums were not net income so applicable.

113 XXV. Your orator is informed and believes and therefore alleges that subsequently to December 1, 1887, the defendant Texas Company paid out of its income remaining after payment of all operating expenses interest at the rate of five per cent. per annum upon its First Mortgage Bonds outstanding under and secured by the First Mortgage of the defendant Texas Company and the defendant New Orleans Company dated February 1, 1888, made to The Fidelity Insurance, Trust and Safe Deposit Company, Trustee, (under which mortgage approximately $25,000,000 principal amount of such First Mortgage Bonds have been certified and issued and
114 are now outstanding) and interest at the rate of six per cent. per annum upon its bonds outstanding under the mortgage on its

Eastern Division in said First Mortgage referred to, and interest at the rate of six per cent. per annum upon the School Fund Loan in said First Mortgage referred to; that the aggregate principal amount of its bonds outstanding under said First Mortgage and under said mortgage on its Eastern Division, together with the principal amount of said School Fund Loan, has at no time exceeded $25,000,000; that the aggregate principal amount of bonds secured by said mortgage on its Eastern Division has at no time since December 1, 1887, exceeded $3,784,000; that the aggregate principal amount of said School Fund Loan has at no time
115 since December 1, 1887, exceeded $167,000; that all except $2,000 principal amount of said bonds secured by said mortgage on its Eastern Division were paid and cancelled prior to December 31, 1905; that said School Fund Loan was paid on or before December 31, 1898; that no bonds were outstanding between December 1, 1887, and December 31, 1898, either issued or assumed by the defendant Texas Company in accordance with the right reserved by it under the paragraph immediately following the *habendum* of the Second Mortgage to issue or assume bonds of certain classes at a rate not exceeding $12,500 a mile and at a
116 rate of interest not exceeding five per cent. per annum, and that the maximum principal amount of bonds so issued or assumed by the defendant Texas Company and outstanding at any time since December 31, 1898, has not exceeded and does not exceed $4,970,000; that the maximum annual interest charge upon all the issues of bonds in this paragraph XXV mentioned, other than the Income Bonds, did not at any time prior to December 31, 1898, exceed $1,289,510, and that the maximum annual interest charge on such bonds other than the Income Bonds has not at any time since December 31, 1898, exceeded $1,538,010; and
117 that since December 1, 1887, the defendant Texas Company has paid large sums for taxes on the property covered by the Second Mortgage, the exact amount of which is unknown to your orator. Your orator is informed and believes and therefore alleges that in addition to the sums specified as surplus in paragraphs XXIII and XXIV hereof, the entire income of the defendant Texas Company remaining after payment of its operating expenses and of all interest payable on the bonds other than Income Bonds hereinbefore in this paragraph mentioned, and of all taxes upon the property subject to the lien of the Second Mortgage, was and is properly applicable to the payment of interest on the Income Bonds up to the rate of five

per cent. per annum; that the income so remaining has not been so applied or paid but has been expended by the defendant Texas Company for purposes and in amounts unknown to your orator but including the purposes, and in amounts equal to or exceeding the amounts, specified in the extracts from the annual reports of the defendant Texas Company of which a compilation is hereto attached marked Exhibit B and made a part hereof; that included among said purposes are the following: interest on funded debt, interest on unfunded debt, interest and discount on current indebtedness, taxes, additions and betterments to property and equipment and new property and new equipment, representing capital expenditures, liquidation of debts and obligations incurred prior to the execution of the Second Mortgage; that except as to the amounts payable for interest on the bonds, other than the Income Bonds, in this paragraph mentioned, and for taxes upon property subject to the lien of the Second Mortgage, such expenditure constituted wrongful diversions and misapplications of net income of the defendant Texas Company applicable up to the rate of five per cent. per annum to the payment of the interest on the Income Bonds, and was in violation of the rights of your orator and of the holders of the Income Bonds; that the Board of Directors of the defendant Texas Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds neglected and refused to determine that said amounts of income so diverted and misapplied were net income applicable to the payment of interest on the Income Bonds, and wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds determined that said income so diverted and misapplied was not net income applicable to the payment of the interest on the Income Bonds.

XXVI. Your orator is informed and believes and therefore alleges that the defendant Railway Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds neglected and refused to pay the interest due and payable out of its net income (as the term "net income" is defined in the Second Mortgage) upon the Income Bonds at the times and place at which said interest became due, except as aforesaid; that the defendant Texas Company neglected and refused to apply said surplus sums aggregating $4,177,856.58 computed as hereinabove in paragraph XXIV described to the payment of the interest on the Income Bonds; that the defendant Texas Company as hereinabove alleged further wrongfully diverted and

misapplied its net income (as so defined) to an amount unknown to your orator but which as hereinabove alleged is shown in the annual reports of the defendant Texas Company and by said Exhibit B to have been amply sufficient to pay large amounts by way of interest on the Income Bonds in excess of
123 the amounts so paid as hereinbefore stated; and that the Board of Directors of the defendant Texas Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds annually during the period subsequent to the execution of the Second Mortgage and prior to the filing of this bill neglected and refused to determine (except as to the amounts paid as hereinabove stated) that such surplus sums and the amounts so diverted constituted net income received by the defendant Texas Company applicable to the payment of the interest on the Income Bonds.

XXVII. That the defendant Texas Company did not make payment on the dates specified below of interest in the amounts specified below and payable out of the net income (as defined in the Second Mortgage) of the defendant Texas Company upon the re-
124 spective principal amounts of Income Bonds then outstanding and stated below, to wit:

Dates	Principal Amounts of Bonds Outstanding	Per Cent. of Interest Not Paid	Amounts of Interest Not Paid
March 1, 1889	$23,207,000.00	5%	$1,160,350.00
March 1, 1890	24,908,143.18	5%	1,245,407.16
March 1, 1891	24,913,580.68	5%	1,245,679.03
March 1, 1892	24,918,931.93	5%	1,245,946.60
March 1, 1893	24,920,953.68	5%	1,246,047.68
March 1, 1894	24,920,953.68	5%	1,246,047.68
March 1, 1895	24,935,117.71	5%	1,246,755.88
March 1, 1896	24,935,545.21	5%	1,246,777.26
March 1, 1897	24,935,587.96	5%	1,246,779.40
125 March 1, 1898	24,935,587.96	5%	1,246,779.40
March 1, 1899	24,935,587.96	5%	1,246,779.40
March 1, 1900	24,973,900.11	3½%	874,086.50
March 1, 1901	24,979,300.11	1 %	249,793.00
March 1, 1908	25,000,000.00	1½%	375,000.00
March 1, 1909	25,000,000.00	5 %	1,250,000.00
March 1, 1910	25,000,000.00	5 %	1,250,000.00
March 1, 1911	25,000,000.00	5 %	1,250,000.00
March 1, 1912	25,000,000.00	5 %	1,250,000.00
March 1, 1913	25,000,000.00	5 %	1,250,000.00
March 1, 1914	25,000,000.00	5 %	1,250,000.00
March 1, 1915	25,000,000.00	5 %	1,250,000.00
Total			$23,872,228.99

That by reason of the failure and refusal of the defendant Texas Company to apply the surplus sums aggregating, or in excess of, the amount of $4,177,856.58 hereinabove mentioned in paragraphs XXIII and XXIV hereof, and more particularly specified below, to
126 the payment of interest on the Income Bonds, default was made by the defendant Texas Company in the payment on the dates specified below of interest in the amounts or in excess of the amounts specified below and due and payable (together with further interest up to the rate of five per cent. per annum) upon the respective principal amounts of Income Bonds then outstanding and hereinabove in this paragraph stated, to-wit:

126*a*

Date	Surplus Remaining Above All Expenditures Charged Thereagainst After Deducting Interest Actually Paid on the Income Bonds, at Expiration of Annual Interest Period Ended Dec. 1st of Preceding Year	Amounts of Interest Defaulted
March 1, 1889	$182,724.93	$182,724.93
March 1, 1890	287,334.32	287,334.32
March 1, 1892	33,019.80	33,019.80
March 1, 1894	527,097.43	527,097.43
March 1, 1895	268,335.94	268,335.94
March 1, 1896	154,971.83	154,971.83
March 1, 1898	447,969.15	447,969.15
March 1, 1899	31,152.64	31,152.64
March 1, 1900	71,982.84	71,982.84
March 1, 1901	207,757.70	207,757.70
March 1, 1909	265,014.98	265,014.98
March 1, 1910	688,362.76	688,362.76
March 1, 1911	447,378.06	447,378.06
126*b* March 1, 1912	186,975.65	186,975.65
March 1, 1915	377,778.55	377,778.55
Total----	$4,177,856.58	$4,177,856.58;

and that such default still continues. That by reason of the failure and refusal of the defendant Texas Company to apply to the payment of interest on the Income Bonds, the amounts of its net in-
126*c* come applicable thereto and diverted as hereinabove alleged in paragraphs XXV and XXVI hereof, further default was made by the defendant Texas Company on the dates specified above as the due dates of the instalments of interest on the Income Bonds which

127 remain unpaid, in amounts unknown to your orator but which, as your orator is informed and believes, are equal to or in excess of the amounts set forth in Exhibit B hereto annexed and alleged in paragraphs XXV and XXVI hereof to have been diverted out of the income of the defendant Texas Company during the respective annual interest periods immediately preceding said respective due dates. Your orator is informed and believes and therefore alleges that, excepting as to the $9,427,209 interest heretofore paid as above stated, the defendant Texas Company has at no time provided any funds at the dates or at the place where interest was due and payable upon the Income Bonds in accordance with the terms thereof and of the Second Mortgage, nor provided elsewhere any funds with which to pay any part of such interest, and on or prior to the due dates of the respective instalments of interest thereon the holders of substantially all of the Income Bonds were informed that the defendant Texas Company
128 had not and would not have any such funds at such place or elsewhere for the purpose of paying such interest, and were informed that the Board of Directors of the defendant Texas Company had neglected and failed to determine that the defendant Texas Company had received net income available for or applicable to such payments, and were informed that said Board had determined that the defendant Texas Company had received no net income so applicable ; that the facts relative to the existence of such net income were peculiarly within the knowledge of the defendant Texas Company and its Board of Directors ; that
129 St. Louis, Iron Mountain and Southern Railway Company, a corporation of Missouri and Arkansas, owns $23,703,000 principal amount of the Income Bonds subject to the pledge thereof under its mortgage known as its Unifying and Refunding Mortgage ; that said St. Louis, Iron Mountain and Southern Railway Company for upwards of fourteen years has owned subject to such pledge more than $22,000,000 principal amount of said bonds ; that
130 all or nearly all of the remainder of the Income Bonds have for many years been owned by officers, directors and holders of large amounts of stock of the defendant Texas Company ; that from and after December 1, 1887, the date from which interest commenced to accrue upon the Income Bonds, a considerable number of the officers and directors of the defendant Texas Company have at all times until March, 1915, been officers and directors of said St. Louis, Iron Mountain and Southern Railway Company ; that during

all the time of the ownership of the Income Bonds by said St. Louis, Iron Mountain and Southern Railway Company as hereinbefore alleged and until March, 1915, the dominant management and
130a control of said St. Louis, Iron Mountain and Southern Railway Company and of the defendant Texas Company have been possessed and exercised by the same persons or group of persons; that by reason of the identity of the interests in control of said two companies, said St. Louis, Iron Mountain and Southern Railway Company took no action to enforce, nor did it request your orator or its predecessor in the trust to enforce its rights or the rights of the Trustee under the Income Bonds and the Second Mortgage and that this bill was not brought earlier for such reason; that said
131 St. Louis, Iron Mountain and Southern Railway Company is insolvent and its properties have been placed in the hands of a receiver and proceedings have been commenced for the foreclosure of its mortgage known as its First and Refunding Mortgage, and that the bonds secured by said mortgage, aggregating more than $29,000,000 principal amount, have been declared due and payable, and that said St. Louis, Iron Mountain and Southern Railway Company is without means wherewith to pay the same; that the receiver of the properties of said St. Louis, Iron Mountain and Southern
132 Railway Company, the owner of more than 94 per cent. of the Income Bonds, has requested your orator to bring suit for the foreclosure of the Second Mortgage and the enforcement of the rights of your orator and of the holders of the Income Bonds; and that no part of said sums of interest in default hereinabove specified in this paragraph XXVII hereof, has been paid by the defendant Texas Company or by any other person in its behalf and that the whole of said sums remain due, owing and unpaid.

XXVII A. Under the provisions of the Income Bonds and the Second Mortgage the defendant Texas Company was and is charged and expressly entrusted with the duty of applying each year its net income to the payment of the interest accruing on the Income Bonds in said mortgage described up to the rate of five per cent.
132a per annum, and in and by the Income Bonds and the Second Mortgage the defendant Texas Company undertook to perform said duty. But except as hereinbefore alleged, the defendant Texas Company has failed to perform the duty so charged upon and expressly entrusted to it, and has diverted portions of its net income to purposes other than the payment of interest on the Income Bonds, and

by reason of such diversion of its net income has failed to pay interest upon the Income Bonds as hereinbefore alleged in paragraph XXVII hereof.

133 XXVIII. That by reason of the wrongful diversion of net income and the default of the defendant Texas Company as aforesaid, the defendant Texas Company should account to your orator for the amount of its net income applicable to the payment of the interest on the Income Bonds and diverted as aforesaid; and your orator is informed and believes and therefore alleges that it is entitled by the terms of the Second Mortgage to exercise the right of entry therein conferred and also any and all other rights and powers
134 therein conferred and provided by it to be exercised and to the appointment of a receiver or receivers of the mortgaged premises and of the earnings, revenue, rents, issues and profits thereof.

XXIX. Your orator is informed and believes, and therefore alleges that the defendant Texas Company has oustanding more than three million four hundred thousand dollars ($3,400,000) principal amount of its promissory notes, which matured on the first day of June, 1915; that on or after said date said notes were duly presented for payment to the defendant Texas Company and that
135 the defendant Texas Company has neglected and refused to pay to the holders thereof the principal of said notes or any part thereof, although said principal is admitted by the defendant Texas Company to be due and payable by it, and that the defendant Texas Company at all times since the said first day of June, 1915, has been and still continues to be in default in the payment of the principal of said notes and has been and is without means to pay the same.

XXX. Your orator is informed and believes, and therefore alleges that the defendant Texas Company and said St. Louis, Iron
136 Mountain and Southern Railway Company are the owners in equal proportions of substantially the entire capital stock of Trans-Mississippi Terminal Company (a Louisiana corporation formed to construct and own railways and railway terminals near New Orleans, Louisiana); that the construction of said railways and railway terminals is now in progress and has heretofore been financed by the issuance of notes of Trans-Mississippi Terminal Company aggregating $6,000,000 principal amount secured by the pledge of its bonds aggregating $7,500,000 face amount; that said notes and
137 bonds have heretofore been jointly and severally guaranteed by the defendant Texas Company and said St. Louis, Iron Mountain

and Southern Railway Company; that the entire authorized issue of such notes and of such bonds respectively have been sold and pledged and the entire proceeds of the notes so sold have been or shortly will be expended; that the defendant Texas Company has heretofore agreed with said St. Louis, Iron Mountain and Southern Railway Company to furnish one-half of all additional moneys which may be required to complete said railways and railway terminals and that said Trans-Mississippi Terminal Company
138 is wholly without the means and wholly unable to procure the means necessary to complete the construction of its said railways and railway terminals; and your orator is informed and believes and therefore alleges that said St. Louis, Iron Mountain and Southern Railway Company is wholly and completely insolvent, and that said St. Louis, Iron Mountain and Southern Railway Company is and will be wholly unable to provide or procure to be provided the funds requisite for the completion of said railways and railway terminals; that in view of the completion of the Panama Canal, the use of said railways and railway terminals
139 as an outlet and feeder for the traffic of the defendant Texas Company through the port of New Orleans is essential to the operation of the lines of railway of the defendant Texas Company; that the completion of said railways and railway terminals is necessary to preserve the defendant Texas Company from threatened loss of its large investments heretofore made in the stock and other securities of said Trans-Mississippi Terminal Company, and from said guaranties heretofore placed upon its notes and bonds;
140 and that the defendant Texas Company is and will be wholly unable to provide or procure to be provided the funds necessary for the completion of said railways and railway terminals.

XXXI. Your orator is informed and believes and therefore alleges that the defendant Texas Company has outstanding a floating indebtedness in a substantial amount for materials and supplies furnished to date and for operating expenses, much of which is now overdue, and that the defendant Texas Company is unable
1 to pay the same; that the defendant Texas Company is and will be without collateral security or other means adequate and available
141 to effect loans for the purpose of meeting such obligations, and is without means adequate and available to meet its immediate and pressing needs in operating its system; that there is grave danger that some of the creditors holding said floating indebtedness may bring suits in respect thereof and may levy execution on the lines

of railway now owned by the defendant Texas Company and on the equipment, materials and supplies and other property of the defendant Texas Company on hand and kept by the defendant Texas Company for necessary use in operating its lines of railway and that the lines of railway of the defendant Texas Company may no longer be operated as a single system but be broken up and separately operated,
142 that it is essential to the interests of the defendant Texas Company and to the interests of the public and of your orator and of the holders of the Income Bonds that the property of the defendant Texas Company should not be sacrificed or dismembered ; that the only means whereby the defendant Texas Company will be able to pay its floating indebtedness and discharge its obligations and to pay the interest upon the Income Bonds is by the continued maintenance and operation of its system and railways as a whole, and
143 by an uninterrupted use thereof ; that any suits or process against its property or its revenue would seriously embarrass and cripple it and destroy its power successfully to operate said system together with its appurtenances ; that unless some definite action is taken so that the operation of its system shall be kept intact, great and severe loss will be inflicted on the public, on your orator and on the holders of the Income Bonds of the defendant Texas Company.

XXXII. Your orator is informed and believes, and therefore
144 alleges that the income and revenues of the defendant Texas Company are and will be wholly insufficient to pay and discharge the indebtedness of the defendant Texas Company now due and owing by it, and the defendant Texas Company has no resources with which to provide for the payment of said indebtedness and is insolvent.

XXXIII. Your orator is informed and believes and therefore alleges that said railroads, property, premises and franchises covered by the Second Mortgage (Exhibit A annexed hereto) constitute one single property which is an instrument and highway of commerce among the several States consisting
145 of a railway and its appurtenances and should be conducted as a single enterprise ; that it is for the interest of all the parties that said railroads, property, premises, and franchises be sold as an entirety in one lot or parcel, and that the value of such property in portions or sections is and will be much less than its value as a whole, and that said mortgaged property, premises and franchises are so constituted that the

same cannot be sold in separate lots and parcels without great and irreparable loss and sacrifice.

XXXIV. That by reason of the matters and things hereinbefore alleged, there is due and payable to your orator as Trustee under the Second Mortgage and to the holders of the Income
146 Bonds, the whole amount of said interest on the Income Bonds which has not been paid by the defendant Texas Company as hereinbefore alleged in paragraph XXVII hereof, aggregating the sum of $23,872,228.99 or such part thereof as should have been paid out of the net income received by the defendant Texas Company applicable to the payment of interest on the entire amount of the Income Bonds issued and outstanding, consisting of said surplus sums hereinabove mentioned in Paragraphs XXIII, XXIV and XXVII hereof, aggregating an amount equal to or in excess of, the amount of $4,177,856.58 and
147 further large amounts diverted by the defendant Texas Company as hereinbefore alleged in Paragraphs XXV and XXVI hereof, the exact amounts of which are unknown to your orator, but which, as your orator is informed and believes and therefore alleges, are equal to or in excess of the amounts shown in the compilation aforesaid, Exhibit B hereto annexed; together with interest thereon from the respective due dates of the instalments of such interest to the payment of which respectively said net income should have been applied; and that no proceedings have been had in law or in equity for the collection or enforcement of said mortgage debt or any part thereof, save only this suit; that your orator has no adequate relief in law and that the relief to which it is entitled can be granted only by a court of equity.

148 XXXV. That by reason of the premises your orator, as Trustee of the Second Mortgage of the defendant Texas Company and the defendant New Orleans Company, is unable adequately to execute its said trust in the manner specified and provided in and by the Second Mortgage without the aid and interposition of this Honorable Court sitting in equity, nor can said trust be executed, as your orator is advised and charges, and the rights of all the parties in interest be ascertained and fully protected, otherwise than by an accounting of the defendant Texas Company for the amount of net income applicable to the payment of said interest and diverted as
149 aforesaid, by the declaration of a lien for such amount by this Honorable Court upon said railroad property and premises, and by a judicial sale of all the property, premises and franchises covered by and embraced in the Second Mortgage.

XXXVI. That this is a suit of a civil nature in equity and the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Five thousand dollars ($5,000) and arises under the Constitution and laws of the United States; and that this suit
150 is commenced to enforce a legal or equitable lien upon and claim to railroads and property which are in a large part situated in said Northern District of the State of Texas.

WHEREFORE your orator prays:

I. That the defendant Texas Company be required to account to your orator for the net income which has accrued to and been received by the defendant Texas Company subsequently to December 1, 1887, and prior to the date of the filing of this bill applicable to the payment of interest on the Income Bonds other than the interest which has been paid as aforesaid. That upon the determination of the amount of such net income applicable to the payment of said interest as aforesaid, said amount, together with the amount of interest due and payable upon such interest may be decreed by this Honorable Court to be a valid and subsisting lien upon all of the railroads and property (real and personal), rights, privileges and franchises
151 in the Second Mortgage described or thereby conveyed or transferred or intended so to be, or which have become subject to the lien thereof; that the nature, extent and character of said property and premises be ascertained and determined; that the defendant Texas Company may be decreed to pay unto your orator for the use and benefit of the holders of the Income Bonds the amount of said interest so defaulted and interest thereon, and all moneys now due and to become due and payable under and by virtue of the Second Mortgage so executed to said The Mercantile Trust
152 Company, as aforesaid, together with a sum sufficient to pay the costs of this action within a short day to be fixed by the Court; and that in default thereof the defendant Texas Company and the defendant New Orleans Company, and all persons claiming by, through or under them, or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged property and premises and every part and parcel thereof; and that all and singular said mortgaged property and premises, with the appurtenances, rights,
153 immunities and franchises in the Second Mortgage described and thereby conveyed or so intended to be, or now held thereunder, may be sold as an entirety and in one lot or parcel under a decree of this Honorable Court, and that the moneys aris-

ing from such sale, after deduction has been made from the proceeds of any such sale of the costs, expenses, fees and other charges of the same and a reasonable compensation to your orator, as Trustee, its agents and attorneys, and all other expenses incurred in the premises, and all payments which may be made for taxes, assessments or liens prior to the lien of the Second Mortgage, except any taxes, assessments or other
154 superior liens subject to which such sale shall be made, may be applied to the payment of the whole amount at that time unpaid upon said $25,000,000 principal amount of the Income Bonds for principal whether or not the same previously shall have become due, and for interest, with interest upon overdue instalments of interest and if there shall be any surplus after making such payments, that the same may be applied in such manner as this Honorable Court may direct; and if there shall be any deficiency after
155 making said payments, that your orator may have judgment against the defendant Texas Company for the amount of such deficiency.

2. That a Receiver may be appointed by this Honorable Court of all and singular the railroads, rolling stock, franchises, rights, interests, property and premises of every kind and description and wheresoever located, belonging to the defendant Texas Company and the defendant New Orleans Company and covered by and embraced in the Second Mortgage to said The Mercantile Trust Company, as Trustee, together with the rents, issues, profits, revenues and
156 income thereof, with the usual powers of receivers in such cases and with full power and authority to take possession of the railroads, rolling stock and all other property (real or personal) embraced in and covered by the Second Mortgage and to operate the same and collect and receive the income and tolls thereof, and to apply the same under the order and decree of this Honorable Court; and that the defendant Texas Company and the defendant New Orleans Company be decreed to make such transfers or conveyances to said receiver appointed as herein provided as may be necessary or proper to put said receiver in possession of said railroad and other property, and to the purchaser and purchasers at
157 any sale or sales of all or any part of said property which may be made in conformity with the provisions of the Second Mortgage or under the decree of this Honorable Court as may be necessary or proper to put such purchaser or purchasers or either of them in possession of the property purchased.

3. That a writ of injunction may be issued out of and under the seal of this Honorable Court by one of your Honors, according to

the statute in such cases made and provided, directing, commanding, enjoining and restraining the defendant Texas Company, its
158 successors, agents and employees and all other persons, firms and corporations whatsoever and wheresoever located, situated or domiciled, from diverting or misapplying the net income of the defendant Texas Company applicable to the payment of the interest on the Income Bonds, and from interfering with, transferring, selling or disposing of, attaching, levying upon or in any manner whatsoever disturbing any part of the property embraced in the Second Mortgage now or hereafter in the possession of this Honorable Court or now or hereafter in the possession of any receiver appointed in this cause.

159 4. That your Honors may grant unto your orator a writ of subpoena, directed to the defendant Texas Railway Company and the defendant New Orleans Company, thereby commanding the said defendants and each of them, at a certain time and under a certain penalty therein to be named, personally to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being expressly waived) all and singular the matters and charges aforesaid, and as fully and in every
160 respect as if the same were here again repeated and said defendants and each of them thereunto particularly interrogated, and to stand to and abide by and perform such orders, directions or decrees as shall be made herein and as to your Honor shall seem equitable and just.

5. That your orator may have such other and further relief in the premises as the nature and circumstances of this cause may require and as to this Honorable Court may seem meet.

And your orator, as in duty bound, will ever pray.

BANKERS TRUST COMPANY,
by F. N. B. CLOSE
Vice-President.

(Corporate Seal)

Attest:

161 GUY RICHARDS
Asst. Secretary.

LOCKE & LOCKE
ALEXANDER & GREEN,
Solicitors for Complainant, Bankers Trust Company.

MAURICE E. LOCKE
W. W. GREEN
Of Counsel.

STATE OF NEW YORK,
Southern District of New York, } ss.:
COUNTY OF NEW YORK,

162 F. N. B. CLOSE, being duly sworn, deposes and says that he is an officer, to wit, the Vice-President of Bankers Trust Company, the complainant above named; that he has read the foregoing amended bill of complaint and knows the contents thereof; that the allegations contained therein in respect of the acts of said Bankers Trust Company are true of his knowledge, and that as to all other allegations contained therein he is credibly informed and believes the same to be true.

F. N. B. CLOSE

Subscribed and sworn to before me this 4th day of February, 1916.

(Notarial Seal) I. MICHAELS

Notary Public New York County N. Y. No. 2429

My commission and term of office as Notary Public expire March 30th, 1916.

Exhibit A

Second Mortgage.

The Texas and Pacific Railway Company

TO

The Mercantile Trust Company of New York.

Dated February 1st, 1888.

This Indenture, Made this first day of February, in the year one thousand eight hundred and eighty-eight, between THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation created by and existing under the laws of the United States of America, and of the States of Louisiana and Texas, hereinafter termed the Railway Company, and THE NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by the laws of the State of Louisiana, parties of the first part, and the MERCANTILE TRUST COMPANY OF NEW YORK, a corporation existing under the laws of the State of New York, hereinafter termed the Trustee, party of the second part.

WHEREAS, The Texas-Pacific Railroad Company was, by its charter, approved by the President of the United States, March 3d, 1871, authorized and empowered to build a line of railway, complete in all its parts, from a point at or near Marshall, in the county of Harrison, State of Texas, westerly to a point at or near El Paso, thence through the Territories of New Mexico and Arizona, and the State of California, to ship's channel in the Bay of San Diego; and by its charter, and by other Congressional and legislative acts, was duly authorized and empowered to unite and consolidate with certain other railroad companies, and acquire all their rights, franchises, and property; and in pursuance of that power did purchase the property and franchises of the Southern Pacific Railroad Company of Texas, by deed dated March 21st, 1872, and did also purchase the rights, franchises, and property of the Southern Transcontinental Railway Company, by deed dated March 30th, 1872, and did also acquire as lessee a leasehold interest in the line of the Vicksburg,

Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company, the State line between Louisiana and Texas; and did also purchase and acquire from the New Orleans Pacific Railway Company, by articles of consolidation and conveyance, made the twentieth day of June, 1881, the franchises, corporate rights and privileges, and the track, roadbed, buildings, rolling stock, engines, tools, privileges, and property, real and personal, of the New Orleans Pacific Railway Company, except the land and land grants acquired by said New Orleans Pacific Railway Company from the Government of the United States, either directly or through the New Orleans, Baton Rouge and Vicksburg Railroad Company; it being provided, however, that the franchise of the New Orleans Pacific Railway Company to be and remain a corporation was not impaired by anything contained in said articles of consolidation and conveyance.

And the said New Orleans Pacific Railway Company unites in the execution of this indenture for the purpose of remising, releasing, and conveying to the said trustee whatever rights, interest, or estate, if any, may remain in the said company, in to, or of the mortgaged premises hereinafter described or any part thereof, to the end of investing the said trustee upon the trusts of this indenture with whatever right, title, or estate may remain, if any, in the said New Orleans Pacific Railway Company in or to the said premises herein mortgaged;

And whereas, The Congress of the United States passed an act, of date May 2d, 1872, by which the name and title of said company was changed to that of the Texas and Pacific Railway Company;

And Whereas, Other rights, privileges, and powers were granted and conferred by the acts of Congress of March 3d, 1873, and June 22d, 1874, and by virtue of said acts of incorporation and such other legislation amendatory thereof and

supplementary thereto the execution of this mortgage and issue of the bonds intended to be secured thereby is fully authorized;

And Whereas, The said Texas and Pacific Railway Company has heretofore constructed and is now the owner of the lines of railway, with the appurtenances, hereinafter described;

And Whereas, The Texas and Pacific Railway Company has also acquired, as aforesaid, the road constructed by and formerly belonging to the New Orleans Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, a distance from Shreveport to Gouldsboro, including said branch, of three hundred and thirty-six (336) miles;

And Whereas, The Texas and Pacific Railway Company has acquired the terminal properties hereinafter described in Gouldsboro and New Orleans, as well as other properties also so described;

And Whereas, At a meeting of the Board of Directors of the Texas and Pacific Railway Company, held on the third day of January, 1888, the following preamble and resolutions were adopted:

Whereas, For the purpose of retiring and adjusting the present mortgage indebtedness of The Texas and Pacific Railway Company in accordance with the terms of a plan of reorganization of the company as set forth in a certain agreement bearing date August 13th, 1886, between Isaac J. Wistar and others, a committee of the bondholders and stockholders of the Texas and Pacific Railway Company, and the stockholders, bondholders, and creditors of the company, it is necessary to make an issue of mortgage bonds, one of which to be an amount not exceeding $25,000,000, to be secured by a second mortgage upon

all and singular the railroad property and franchises of the company, which shall be used to settle with other creditors of the said company, as stipulated in the said agreeement and its amendments;

Resolved, That the President or Vice-President and Secretary of this Company be and they are hereby authorized and directed to execute under the common seal of this Company, its bonds to the amount of twenty-five million dollars, in form substantially as follows:—

No. $1000.

UNITED STATES OF AMERICA.

States of Louisiana and Texas.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

SECOND MORTGAGE INCOME BOND.

The Texas and Pacific Railway Company, a consolidated corporation existing under the laws of the United States and of the States of Louisiana and Texas, acknowledges itself to be indebted unto the bearer or after registration to the registered holder hereof in the sum of one thousand dollars ($1000) in gold coin of the United States of the present standard of weight and fineness, which sum the Railway Company promises to pay the bearer or registered holder in case of registration on the first day of December, A. D. 2000, at its office or agency in the City of New York, and to pay interest thereon out of the net income of the Railway Company as the same may be determined by its Board of Directors, at the rate of five per cent. per annum from December 1st, 1887, in like gold coin, at the said office or agency, payable annually on the first day of March following, on the surrender of the annexed coupons: *Provided, however*, That interest hereon shall be payable to the extent only that such net income, if any, permits, and that interest hereon shall be noncumulative.

On and after March 1st, 1892, the trustee of the mortgage securing this bond, in case of non-payment of full interest at five per cent. per annum, shall, on request of the holders of not less than one-third of the bonds outstanding, enter into possession of the mortgaged property and manage the same under the direction of a committee appointed by a majority of the bondholders, until payment of interest in full. All payments both of principal and interest shall be made without deduction of any taxes which the Railway Company may be required to pay or to retain therefrom by any present or future law of either of the said States or of the United States, the Railway Company hereby agreeing to pay all such taxes.

This bond is one of a series of bonds of like tenor and amount numbered from 1 to 25,000, both inclusive, and all equally secured by and subject to the terms and conditions of a second mortgage, to which reference is hereby made, bearing even date herewith, executed and delivered by the said Railway Company, to the Mercantile Trust Company of New York, as trustee, for the holders of said bonds, conveying its railroad franchises and certain other property therein more particularly described, subject to a first mortgage bearing even date herewith, to which reference is hereby made, given by the said Railway Company to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, as trustee, to secure an issue of bonds to the amount of $25,000,000.

This bond may be registered on the books of the said Railway Company, and after a registration of ownership shall be certified hereon by the transfer agent of the company no transfer will be valid unless made upon the said books, but such transfer may be made to bearer, which will restore transferability by delivery, and successive registrations to a party named or to bearer at the option of each owner may be made. And upon registration the owner may at his option surrender the unpaid coupons hereto annexed, which will thereupon be permanently canceled, and thereafter interest will be paid only to the registered owner, or to his authorized attorney, but until the coupons are surrendered they will continue to be payable and will be paid to the bearer thereof, although the

bond may have been registered. This bond shall not become obligatory until authenticated by the Trustee's certificate properly executed.

In Witness Whereof, The Texas and Pacific Railway Company has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its President and Secretary, on the first day of February, A. D. one thousand eight hundred and eighty-eight.

President.

Secretary.

On the first day of March, A. D. , The Texas and Pacific Railway Company will pay to bearer, at its agency in New York, in gold coin, such portions of its net earnings, if any, not exceeding fifty dollars, as shall, in accordance with the mortgage securing the same, be then applicable to the payment of interest on its Second Mortgage bond No. . If there be no net earnings applicable thereto, this coupon will then become void.

Treasurer.

TRUSTEE'S CERTIFICATE.

The Mercantile Trust Company hereby certifies that this is one of a series of bonds issued under the terms of a mortgage of the Texas and Pacific Railway Company, bearing even date therewith, and therein more particularly referred to.

THE MERCANTILE TRUST COMPANY,
By

President.

Resolved also, That to secure the payment of said bonds, the President or Vice-President and Secretary of this Company execute a mortgage of all the property and franchises of the Company in form now presented and approved.

And Whereas, At a meeting of the Board of Directors of the New Orleans Pacific Railway Company the execution of this mortgage was duly authorized;

And Whereas, The Texas and Pacific Railway Company, in pursuance of said resolution and of all and every legal power and authority in them vested, propose to make, execute, and issue bonds secured hereby, in the manner heretofore mentioned, amounting in the aggregate to twenty-five million dollars:—

Now, therefore,

This Indenture Witnesseth, That the Texas and Pacific Railway Company and the New Orleans Pacific Railway Company, parties of the first part, for and in consideration of the premises and the sum of one dollar ($1) to them duly paid by the said Trustee party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure equally the payment of the principal and interest of the bonds aforesaid at any time outstanding, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm, assign, transfer and set over, and do hereby mortgage, hypothecate, and affect unto the said Trustee party hereto of the second part and its successors and assigns, all and singular the railroads, property, franchises, rights, and privileges of the Railway Companies, which are more particularly described as follows, viz:—

All of the Texas and Pacific Railway Company's line of railway, extending from a point on the State line between the States of Louisiana and Texas westwardly to Marshall and from Marshall by way of Dallas to Fort Worth, in the State of Texas; and from Texarkana on the State line between Texas and Arkansas, to its junction via Clarksville, Paris, Bonham, Sherman, and Whitesboro with the main line aforesaid at Fort Worth; and from Marshall aforesaid through the town of Jefferson to its

junction at or near Texarkana, with the said line from Texarkana to Forth Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument, upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Railway Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport to Gouldsboro, including said branch, being about three hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana and Texas Railroad and Steamship Company by deed of February 15th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions, and improvements constructed during the receivership under the proceedings instituted in the Circuit Court of the United States for the Fifth Circuit; also the right, title, and interest of the said Railway Company of, in, and to the Gordon Coal Mine and lands connected therewith in Palo Pinto county, Texas

and the spur of railroad of about six miles leading to said mine ; also all of the terminal properties in Westwego, Gouldsboro and New Orleans, described as follows :—

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof ; for greater certainty, said property is described as follows :—

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the First District of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans Cotton Press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the First District in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing the whole of the square bounded as above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the First District on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the Sixth District of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street ; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans Park. All said property is more fully described in said deed of said

junction at or near Texarkana, with the said line from Texarkana to Forth Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument, upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Railway Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport to Gouldsboro, including said branch, being about three hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana and Texas Railroad and Steamship Company by deed of February 15th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions, and improvements constructed during the receivership under the proceedings instituted in the Circuit Court of the United States for the Fifth Circuit; also the right, title, and interest of the said Railway Company of, in, and to the Gordon Coal Mine and lands connected therewith in Palo Pinto county, Texas

and the spur of railroad of about six miles leading to said mine ; also all of the terminal properties in Westwego, Gouldsboro and New Orleans, described as follows :—

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof ; for greater certainty, said property is described as follows :—

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the First District of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans Cotton Press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the First District in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing the whole of the square bounded as above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the First District on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the Sixth District of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street ; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans Park. All said property is more fully described in said deed of said

Dodge hereunto referred to, and made part hereof, and forms part of the terminals of said railway in New Orleans.

6. Also the thirty-eight lots, squares, and portions of ground, with all buildings thereon, situated in the town of Gouldsboro, formerly McDonoughville, in the Parish of Jefferson, State of Louisiana, on the right bank of the Mississippi river, as set forth and described in a certain deed from G. M. Dodge to the Texas and Pacific Railway Company, dated 27th June, 1883, and recorded in said Parish, August 13th, 1883, in Conveyance-book P, folios 495 to 502, inclusive, hereby referred to and made part hereof, and described as therein shown and being in the yard limits and forming part of the terminals of said railway on the right bank of said river.

7. Also lots 14 and 15 in square 37, bounded by Adams, Jefferson, Copernicus, and Americus streets, in the town of Gouldsboro, described in a certain deed dated July 21st, 1883, from Thomas Carr to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folio 481, and hereby made part hereof, and forming part of said last-named terminals in said limits.

8. Also square of ground No. 52 in the town of Gouldsboro, bounded by Jefferson, Madison, Potolemy, and Lawrence streets, containing twelve lots described in a certain deed dated January, 26th, 1883, from Pierre Nougue to the Texas and Pacific Railway Company, duly registered in Book B, New Orleans, 116, folio 732; in Jefferson Book B, folios 280, 281, which deed is referred to for greater certainty and made part hereof, and forming part of said last-named terminals in said limits.

9. Also five certain lots of ground situated on the right bank of the Mississippi river opposite New Orleans, in the town of Gouldsboro, in square No. 14, bounded by Adams, Copernicus, Americus streets, and the Levee, as described in a deed dated 9th December, 1882, from Louis Schwartz to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folios 232 and 233, and made part hereof for greater certainty, and forming part of said last-named terminals.

Also the lot on the actual corner of Front and Terpsichore streets, in the city of New Orleans, having forty-seven feet front on Front street, more or less, and extending to the Mississippi river, the legal line of Terpsichore street being its northerly boundary, and with the riparian rights, and forming part of the terminals of the Railway Company in New Orleans.

Also all and singular that certain tract and parcel of land situate in the parish of Jefferson, in the State of Louisiana, on the right bank of the Mississippi river, which was sold and conveyed to the New Orleans Pacific Railway Company by the Morgan's Louisiana and Texas Railroad and Steamship Company, by deed dated the fifteenth day of February, 1881, with other property, for the consideration of $745,110.42, which said deed is duly recorded in Book of Conveyances N. 32, folio 199, &c., Parish of Ascension, on the seventeenth day of February, 1881, and which land, comprising about one hundred and seventy-three acres, more or less, forms part of the terminals of said railway at Westwego. Also the tract of land of eighty acres, more or less, at Wheelock, parish of Iberville, forming relay station. Also the transfer steamer "Gouldsboro," at New Orleans, her tackle, apparel, furniture, and machinery, and the new transfer boat now being built at New Orleans. Also all the rights, privileges, and franchises conferred by the city of New Orleans and other municipal corporations on the New Orleans Pacific Railway Company and its assigns, the Texas and Pacific Railway Company, by ordinance or grant.

Also all and singular the terminal properties and facilities, and their appurtenances, situated in Westwego, Gouldsboro, and New Orleans, and now in the possession and use of the said Texas and Pacific Railway Company in the conduct and operation of its road and the transaction of its business, whether acquired by donation, purchase or expropriation, including steamboats, warehouses, and docks; and including and intending to include in these presents the road-bed and superstructure and the right of way of said railroad, rails, tracks, side tracks, bridges, viaducts, buildings, depots, station-houses, car-houses, engine-houses, shops, warehouses, turn-

tables, water-stations, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind thereunto belonging or in anywise appertaining, or which have been or may be acquired or provided for use upon or in connection with the said railroad; and all lands acquired or designed for depots, warehouses, and other structures at either terminus, as well as along the line of said road; and also all gravel pits and sand pits at any time heretofore acquired for the use of said road, all the locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels, now or hereafter belonging or appertaining to said railroad, and all property, both real and personal, of every kind and description which shall hereafter be acquired for use upon or in connection with, or for the purposes of the said railroad, and whether acquired heretofore or hereafter by said Railway Company or its Receivers; and all the corporate rights, privileges, and franchises which the said Railway Companies, or either of them, have and can exercise or shall hereafter acquire or possess, of, in, to, upon, or in respect of the said railroad, or any part thereof, or necessary for the construction, maintenance, or operation of said railroad between said points, or anything belonging or appertaining, or which may hereafter belong or appertain to the same, or any part thereof, and all the rents, issues, profits, tolls, and other income of the said railroad, and all the rights, privileges, and franchises whatsoever which the said Railway Companies now possess, own, or are entitled to, and all rights, privileges, and franchises, properties real and personal, and rights and things which the said Railway Companies may or shall acquire, possess or become entitled to for the purposes of or in connection with the said railway, or in the operation, use, and maintenance thereof, and all the corporate and other franchises of the said railway companies, including their franchise to be corporations. Including all the franchises, rights, privileges, and property acquired from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Vicksburg, Shreveport and Texas Railroad Company, and the New Orleans Pacific Railway Company.

TO HAVE AND TO HOLD The said above-described premises, railroads, property, rights, franchises and appurtenances, unto the said Trustee, and its lawful successors or successor, heirs, executors, administrators, and assigns forever, to and for the only proper use and behoof of the Trustee and its successors or successor, heirs, executors, administrators, and assigns forever, subject, however, to the mortgage or deed of trust to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Trustee, bearing even date herewith, to secure bonds amounting to $25,000,000, and to the payment of all the bonds issued or to be issued thereunder, as well as the School Fund Loan and the mortgage on the Eastern Division in said mortgage for $25,000,000 referred to.

AND ALSO SUBJECT TO THE RIGHT OF the Railway Company, with the assent of two-thirds of the members of its board of directors to protect its business by the construction or acquisition of branch or connecting lines, and to mortgage the branches so constructed or acquired at a rate not exceeding $12,500 a mile, and at a rate of interest not exceeding five per cent. per annum, or to assume existing mortgages of no greater amount per mile or rate of interest on branch or connecting lines, and to contract that the amount required to pay the interest upon the bonds so issued or assumed shall be made a rental charge, and in case of any deficiency in the earnings of said branch lines to meet such rental charge, that the same shall be made up out of the earnings of the lines of railway, and property hereby mortgaged, and before payment of interest on the second mortgage, the sum necessary to meet such deficiency to be a charge upon the income of the Railway Company prior to the interest upon the said Second Mortgage Bonds.

BUT IN TRUST, NEVERTHELESS, For the equal *pro rata* benefit and security of all and every the persons, firms, or corporations who may be or become holders of the said bonds issued under and secured by this deed of trust or mortgage without preference, priority, or distinction as to lien or otherwise of any one

over the others, by reason of priority in time of issuing or negotiating the same, and so that each and all of the said bonds, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under and by this deed of trust or mortgage, and shall all be equally secured hereby, with like effect as if they had all been made, executed, delivered, and negotiated simultaneously on the date of the execution and delivery hereof, it being intended that the lien and security of all of the said bonds shall take effect from the date of the execution and delivery of this deed of trust or mortgage, whether the same shall actually be sold or disposed of at such date, or whether they or any part of them shall be negotiated and sold at some future date, and that the lien and security of this deed of trust or mortgage, and all the bonds that may be issued under the same, shall take effect from the date of the execution and delivery hereof as though actually sold and delivered to and in the hands of innocent holders for value upon such date and the lien and security of said bonds shall in no manner be altered, impaired, or prejudiced by the creation of subsequent mortgages by the Railway Company or by the entry or acquisition of judgments or liens in any form by creditors at any future time.

AND IT IS HEREBY EXPRESSLY COVENANTED AND UNDERSTOOD, By and between the parties of the first and second parts hereto, the parties of the first part covenanting as well for themselves as for their successors and assigns, and the Trustee covenanting as well for itself as for its successors or successor in the trust; that the said above described premises, railway, property, rights, franchises, and appurtenances, are to be had and holden by the said Trustee upon and for the trust, uses, and purposes following, that is to say:

ARTICLE ONE.—The bonds to be issued under and secured by these presents, hereinafter designated as Second Mortgage Bonds, shall not exceed in the aggregate $25,000,000; AND WHEREAS, The bonds to be issued under and secured by this mortgage, or so many thereof as shall be necessary, are to-

gether with certain bonds to be issued under the first mortgage of contemporaneous date herewith to be used for the purpose of exchanging into the bonds of the Railway Company and of the New Orleans Pacific Railway Company which have been deposited under the said Plan of Reorganization and secured by the mortgages of the Railway Companies, known as the Eastern Division Consolidated Mortgage, the New Orleans Pacific Division Mortgage, the Rio Grande Division Mortgage, and the General and Terminal Mortgage, and of settling with the holders of the Land Grant Bonds, and it may be unadvisable or impracticable to secure the immediate satisfaction or release of the said mortgages, it is further covenanted and agreed that the bonds issued under the said several mortgages, and deposited under the said plan, shall be transferred and delivered to the trustee of the first mortgage to be held as security for the bonds to be issued under this present indenture of mortgage and a first mortgage to be issued by the Railway Company cotemporaneously herewith, until the said mortgages shall have been satisfied, or, in the judgment of the trustee of the first mortgage, it is prudent to cause the bonds so transferred and delivered to be cancelled.

ARTICLE TWO.—Until default shall be made by the said Texas and Pacific Railway Company, its successors or assigns, in the due and punctual observance and performance of any one or more of the covenants and agreements herein contained, on the part and behalf of said Railway Company, its successors and assigns, to be kept and performed; the said Railway Company, its successors and assigns, shall be suffered and permitted to have the actual possession of the railway property and premises hereinbefore described, and of the whole thereof, to use and employ the same and every part thereof, and to exercise and enjoy all the rights and franchises appertaining thereto, and to collect, receive, and use the tolls, incomes, rents, issues, and profits thereof, in any manner, which will not impair the lien created by these presents.

ARTICLE THREE.—And the said Texas and Pacific Railway

Company, in consideration of the premises, covenants, promises, and agrees :—

I. That having possession, as aforesaid, it shall and will well and truly pay off and discharge, or cause to be paid off and discharged, each and every tax, assessment, or other liability and governmental charge, which may, from time to time, be lawfully levied or imposed by competent authority upon the said railway property and premises or upon any part thereof, the lien whereof might or could be held to be superior to the lien of these presents, and also the interest which from time to time may become due and payable upon any bonds, the payment of which is secured by a mortgage prior in lien to these presents, and the principal of said bonds as and when the same shall mature, so that the security of the bonds issued herewith shall at all times be duly maintained and preserved.

II. That having possession, as aforesaid, it shall and will at all times maintain in full quantity, number, and efficiency and keep insured its rolling stock, tools and machinery, buildings, bridges or other structures, erected or to be erected on the premises, and all other property provided for use in connection with the railway herein described, usually insured by railway companies, and in the same manner and to the same extent, and simultaneously with the execution hereof it will furnish to the Trustee a full and complete inventory or schedule of said rolling stock and equipment.

III. That having possession, as aforesaid, it shall and will diligently preserve all the rights and franchises to it granted and upon it conferred by the acts of Congress, appertaining to the railway property and premises subject to the lien hereof and otherwise, and whenever necessary or advisable comply with the laws of any State wherein the routes aforesaid, or any it may hereafter acquire the right to construct its road on or any part thereof, may now or shall at any time hereafter be situate, in such manner and form as counsel learned in the law shall advise, with a view to effectually preserve, obtain, or secure the corporate rights and franchises,

enabling it to locate, construct, use, operate, and maintain the said railway line or lines whereon these presents shall constitute a lien throughout the whole extent thereof, and charge tolls thereon for the transportation of passengers and freights, and that using and operating the said railway as the same was heretofore constructed, or as the same or any section or part thereof shall hereafter be constructed and completed, ready for use and operation, it shall and will, at all times, maintain, preserve, and keep the same, and every part thereof, with the rolling stock, fixtures, and appurtenances, and every part and parcel thereof, in thorough repair and working order, at least equal to its present condition in respect to the road-bed, ties, and rails, motive power, rolling stock and equipment, and fully supplied with suitable and sufficient motive power, rolling stock, and equipment, and shall and will, from time to time, make all needful and proper repairs, renewals and replacements, useful alterations, additions, betterments and improvements, so as to maintain the same in proper order and in complete repair and good working condition, so that the traffic and business of the said road and of every part thereof shall at all times be done with safety and expedition.

IV. That it shall not and will not issue, negotiate, sell, or otherwise dispose of the Second Mortgage Bonds to be issued hereunder, in any manner inconsistent with the provisions of these presents, and its agreements in that behalf herein contained, and that issuing, selling, negotiating, or otherwise disposing of its Second Mortgage Bonds, from time to time, it shall and will well and truly apply, or cause to be applied the same, or the proceeds thereof, to and for no purposes other than those hereby contemplated as aforesaid.

V. That it shall and will well and truly pay, or cause to be paid, to the holders of the Second Mortgage Bonds to be issued hereunder, as hereinbefore stated, or of such of the said Second Mortgage Bonds as shall from time to time be outstanding and secured hereby, and every one of them, the principal thereof, according to the true intent and meaning thereof, and pay interest on said principal sum up to the rate

of five per cent. per annum from December 1st, 1887, payable annually on the first day of March in each year, the first payment, if any, to be due March 1st, 1889, in like gold coin out of the net income of the Railway Company, as the same may be determined by the board of directors of the Railway Company. If the income of the Railway Company applicable for the interest on said bonds shall not, in the judgment of the board of directors, be sufficient to pay the said interest in full, such interest or so much as shall remain unpaid shall not accumulate, and all payments both of principal and interest shall be without deduction from either said principal or interest for any tax or taxes which, by any present or future laws of the United States or the States of Texas and Louisiana, may be payable for or in respect of the said principal or interest for national, State, or municipal purposes; the Railway Company hereby agreeing to pay all such tax or taxes which it may now or hereafter be required by any such law to retain therefrom.

And in case of default of such payment by said Texas and Pacific Railway Company, from any cause whatever, the Railway Companies for the consideration in said Second Mortgage Bonds mentioned, further hereby covenant, promise, and agree that they shall not and will not at any time hereafter insist on or plead in any manner whatever, claim or take the benefit or advantage of any stay or extension law, which may now or at any time hereafter be in force, in any locality where the railway property and premises hereby conveyed or intended so to be, or any part thereof, may or shall be situate; or claim, take, or insist on the benefit or advantage to be derived from any law, now or hereafter in force, as aforesaid, providing for the valuation or appraisement of said railway property or premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to the provisions hereinafter contained or the decree of any court of competent jurisdiction; or after any such sale or sales, claim or exercise any right which they may now or hereafter have, by statute enacted by the legislature of the State of Texas or Louisiana, or other State wherein the said railway property or premises, or any part

thereof shall or may be situate, to redeem the property so sold, or any part thereof; and said Railway Companies hereby expressly waive all benefit and advantage that they might or could derive by virtue of any such law or laws and agree not to hinder, delay, or impede the execution by said Trustee of the powers of entry and sale hereinafter conferred upon, granted, and delegated to it, but to suffer and permit the execution of such powers, as if such law or laws had not been made or enacted.

VI. Further, that at all times until said Second Mortgage Bonds, with interest, shall be fully paid, the Railway Company will permit the Trustee, its agents, clerks, or attorneys, for that purpose to be duly authorized, fully to inspect all the books of account of the Railway Company, together with its books, reports, memoranda, or other papers, and to take such extracts therefrom as may be deemed expedient to fully report thereon, with convenient details. And further, that if at any time the net income of the road hereinbefore conveyed properly applicable to the payment of the interest on the outstanding bonds hereby secured shall be insufficient for such payment, the Railway Company will, without delay, furnish to the Trustee full and detailed accounts and statements of the gross earnings and receipts of said road, and of all the expenses, disbursements, and deductions out of or charged against the same during the period in which there shall be such deficiency.

VII. The Railway Company shall and will from time to time hereafter, upon the demand of the Trustee, grant, convey, confirm, assign, transfer, and set over unto the said Trustee all real estate which may be hereafter acquired, and all personal estate, corporate rights, and franchises which it, the Railway Company, shall hereafter in any way or manner acquire as appurtenant to, or in, or for use upon, or for the business of the railroads hereby mortgaged, or any of them, and shall and will also make, do, seal, execute, deliver, and acknowledge, or cause to be made, done, sealed, executed, de-

livered, and acknowledged, all and every such further acts, matters, things, deeds, conveyances, bills of sale and transfers, and assurances in the law for the better assuring, conveying, and confirming unto the Trustee all and singular the hereditaments and premises, estates and property hereby conveyed, or intended so to be, or which are hereby covenanted and agreed to be hereafter conveyed to the said Trustee as by such Trustee, or their counsel learned in the law, shall be desired or required for the better effectuating and carrying out the provisions, objects, and purposes of this mortgage, and securing payment of the principal and interest of the bonds intended to be hereby secured; all of which estates shall be held by the said Trustee in, under, and upon the several and respective trusts, and for the uses and purposes and subject to the powers and authorities herein mentioned, declared, given and expressed.

ARTICLE FOUR.—In case default shall be made by said Railway Company on or after March 1st, 1892, in the payment of full interest at the rate of five per cent. per annum on any of the Second Mortgage Bonds which may at any time have been issued and be then outstanding and secured by these presents or in case default shall be made by said Railway Company in the payment of the principal of any of such bonds when and as the same, according to the terms thereof, shall mature; or in case default shall be made by said Railway Company in the payment of any tax, assessment, or other governmental charge lawfully levied and imposed upon the said railway property and premises, or any part thereof, or any other prior lien, and such default shall continue for the period of three months after such tax, assessment, or other governmental charge or lien shall have become due and payable; or in case said Railway Company shall make default in the due observance and performance of its covenant of further assurance, or any other of its covenants, promises and agreements herein contained, and either of such defaults continue for the period of three months; then and in each and every such case of default continued as aforesaid, on the request of holders of not less than

one-third of the bonds outstanding the said Trustee shall personally, or by its agent or agents, attorney or attorneys, enter into and upon all and singular the railway property and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and exclude the said Railway Company, its agents and servants wholly therefrom, and having and holding the same, use and operate, manage and control said railway, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, and servants or attorneys, to the best advantage of the interests as well of the public as of the holders of Second Mortgage Bonds secured hereby in accordance with law and any statute relating to said railway or any part thereof, or to the operation thereof; and upon such entry it shall be lawful for the said Trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railway, and whereof it shall become possessed as aforesaid in the same manner and to the same extent as is usual with railway companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and replacements, and useful alterations, additions, betterments, and improvements thereto and thereon, as well in respect of the rolling stock or equipments as in respect of the railway and appurtenances and other subject-matters as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railway and conducting the business thereof and of all repairs, renewals replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents,

clerks, servants, and other employés by it properly engaged and employed, the said Trustees shall apply the moneys arising as aforesaid, to the payment of the interest which shall be due and payable on the bonds outstanding and secured hereby, in the order in which such interest shall become due, ratably to the persons or parties entitled to receive the same: *Provided, however*, That the holders of a majority of the said bonds may appoint a committee to direct and supervise the management of the property by said Trustee, which committee shall have such powers, control, and supervision, as are or may be conferred upon and exercised by the board of directors of the Railway Company.

ARTICLE FIVE.—There shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage, but in case default shall be made by the said Company in the payment of the principal of any of the said Second Mortgage Bonds, when the same shall become and be due as therein or hereinbefore provided, and in each such case of default it shall be lawful for the said Trustee, after entry as aforesaid, or other entry, or without any entry, personally or by its attorneys or attorney, agents or agent, to sell and dispose of all and singular the railway property and premises, rights, franchises and interests, lands and appurtenances, hereby conveyed or intended so to be, or from time to time as they shall deem proper, of so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay the amount due on such bonds then outstanding, for principal and interest, according to the terms thereof, together with the costs and expenses of such sale, and of all right, title, and interest, claim and demand whatsoever, benefit, equity of redemption, and statutory right to redeem of the said Company, its successors and assigns, of, in, and to the same, or so much thereof as may be sold, and every part thereof, at public auction at such place in the city of New Orleans, or on the premises or any part thereof, and at such time and upon such terms

as may be specified in the notice of sale to be given as hereinafter provided, for the highest and best price the same will bring in cash.

Preparatory to such sale the said Trustee shall give notice of the time and place, when and where, and the terms upon which, the same is to be made, and containing a description of the property to be sold, by advertisement thereof in one newspaper at that time published in each of the cities of New Orleans, Philadelphia, and New York, and in the State of Texas, once a week for six successive weeks; and upon any sale or sales under this instrument the said Trustee is hereby empowered to make, execute, and deliver to the purchaser or purchasers at any such sale a good and sufficient deed, or good and sufficient deeds of conveyance, for the railway property and franchises sold. In case of any sale or sales by virtue of any of the provisions of this instrument, the said company hereby expressly and absolutely agrees to waive, and hereby irrevocably waives the benefit or advantage of any and all valuation, stay, appraisement, or extension laws, and any statutory right to redeem, now existing, or which may hereafter be in force in the State or States wherein the property to be sold under this instrument or any part thereof, may at the time of the sale be situate, or where the sale may take place, which, but for this provision, agreement, and waiver might be operative, in respect of any such sale, or might be availed of to prevent or postpone an absolute or immediate sale under the provisions of this instrument, or to redeem after any sale the property sold thereat, or any part thereof; and it is likewise expressly declared that any sale or sales made by said Trustee, under or by virtue of this instrument, when completed, shall operate to divest all title, rights and interest, claims and demands whatsoever both at law and in equity of said Railway Companies of, in, and to the rights, property, powers, privileges, and franchises sold, and shall be a perpetual bar both at law and in equity against the said Railway Companies, their successors and assigns, and any and all persons whomsoever claiming or to claim the railroad property, rights, powers, privileges, and franchises sold, or any part or parcel thereof, by, from, through, or under the said Rail-

way Companies, its successors and assigns, or any of them. And the said Trustee shall apply the proceeds or avails of any sale to be made under the provisions of this instrument, and the purchase-money paid thereon, after, deducting therefrom just allowances for all expenses connected therewith, including attorney and counsel fees, as well as any and all advances, expenses, and liabilities which may have been made or incurred by said Trustee in using, operating, maintaining, and preserving said railroad property and premises, or in carrying on and managing the business for the period the same may have been in the said Trustee's possession, or in arranging for making and completing the sale and payments for taxes, assessments, or other charges or liens prior to the lien of these presents, if any such there shall then be, and the said railway property and premises, or any part thereof, shall not have been sold subject thereto, as well as just and reasonable compensation for the said Trustee's own services, to the payment of the principal of such of said bonds as may be at that time outstanding, and of the interest which shall have accrued upon the said principal up to that time, according to the tenor thereof, without discrimination or preference as between principal and interest, but ratably, to the aggregate amount of such principal and accrued interest; it being understood and hereby declared and agreed, that such payment shall be made to the persons holding the bonds evidencing the right to such principal and interest, without discrimination or preference between them on account of the time of the actual issue of said bonds, and, if after payment in full of all the said bonds, principal and interest, a surplus of the said proceeds of sale shall remain, the said Trustee shall pay over such surplus to the said Railway Company, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

And it is hereby declared and agreed that the said Trustee may, from time to time, adjourn any sale to be made under the provisions of this instrument, by announcement made at the time and place appointed for such sale, and if so adjourning such sale, may make the same at the time and place to which the same shall be so adjourned, and without further notice thereof.

And it is further declared and agreed that the receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers of the property, which shall be sold as aforesaid for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after paying such purchase-money and receiving such receipt, be liable to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of any such purchase-money, or any part thereof.

And it is further agreed that no part of the premises hereby mortgaged or intended so to be shall be sold under proceedings at law, by the holder or holders of all or any of the bonds intended to be hereby secured, it being the intention and agreement of the parties for the better securing the largest possible price for the mortgaged premises in the event of a sale thereof, that the same shall only be sold in the manner herein provided or under proper proceedings in a Court of Equity for the foreclosure of this mortgage.

ARTICLE SIX.—It is hereby mutually agreed, that at any public sale of the railway property, premises, rights, privileges, and franchises hereinbefore conveyed, made by virtue of the powers herein granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the Trustee, under these presents for the time being may, in its discretion and not otherwise, bid for, and if the same be obtainable at the price hereafter mentioned, purchase and acquire the property so offered for sale, in behalf of all the holders of bonds secured by this instrument, which shall then be outstanding, in proportion to the amount of said bonds by them respectively held: *Provided, however*, That nothing herein contained shall authorize the said Trustee to bid, on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, according to the tenor thereof, and the costs and expenses of such sale for the entire property then held upon the trusts of this inden-

ture, or any amount reasonably proportionate thereto, for any part of said property.

And it is further agreed, that the Second Mortgage Bonds shall be received in payment of the purchase-money of any property sold by virtue hereof, as equivalent to so much cash of the said purchase-money as would be distributable and payable thereon.

ARTICLE SEVEN.—Upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the Trustee and of the bondholders under these presents, the said Trustee shall be entitled to exercise the right of entry herein conferred, or to the appointment by any court of competent jurisdiction of a receiver or receivers of the property hereby mortgaged, or of the earnings, revenue, rents, issues, or profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

ARTICLE EIGHT.—The Railway Company may at any time hereafter and before the full payment of the bonds secured hereby, and whenever it shall deem it expedient for the better security of the said bonds, although there may not then have occurred any such default as to entitle the said Trustee to enter into possession under article five hereof, surrender and deliver to said Trustee full possession of the whole, or any part of the said railway property and premises, rolling stock, lands and appurtenances, rights, franchises and interests, hereby conveyed or intended so to be, for any term or terms, certain or indefinite. The said Trustee, upon such surrender and delivery, may at its option, enter into and upon the premises so surrendered and delivered, and take and receive possession thereof, for such term or terms, certain or indefinite, as aforesaid, without prejudice, however, to its rights at any time subsequently to insist upon and maintain such possession, though beyond such term, whenever it would have been entitled thereto, had no such voluntary surrender been made.

And upon the voluntary surrender and delivery of the said railway property and premises, or any part thereof, as herein

provided, the said Trustee shall and will during the term or terms for which possession shall be taken, and while said property and premises shall remain in its possession, work, use, manage, control, and employ the same, in accordance with the provisions of article four of these presents, and receive the incomes and revenues thereof, and apply the same to the best advantage of all parties in interest.

ARTICLE NINE.—And it is further mutually agreed that the said Railway Company shall and will keep a register or registers of bonds issued hereunder at its office or agency in the city of New York, which shall at all reasonable times be open to the inspection to the Trustee, and that any holder or holders of any of the bonds issued under the provisions hereof may register his or their bond or bonds upon presenting the same, and that when a bond shall be so registered the person or persons in whose name or names the same shall be registered, shall be deemed and regarded as the owner or owners thereof for all purposes, and payment of or on account of the principal sum in such registered bond mentioned, shall thereafter be made to such person or persons, his or their order only, and all such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid, provided that such registry may be changed, and the bonds so registered be transferred, upon presentation with the written order of the person or persons in whose name or names the same shall stand registered, properly authenticated, to the person or persons whose name or names shall in such written order be contained to that end; and thereafter the person or persons to whom such bond shall have been so transferred as aforesaid shall be held to be the owner or owners thereof with all the incidental rights and powers, and such transfers may be made from time to time as the registered owner or owners of any such bond for the time being may direct as aforesaid; and the registered owner or owners shall also have the right to register any of the bonds registered in his or their names, as payable to bearer, in which case the transferability by delivery shall be restored, and the principal

thereof be payable to the person presenting the same. But any holder or holders of a bond registered to bearer may again cause such bond to be registered in his name or their names with the same effect as the first registration, and successive registrations as aforesaid may be made from time to time as desired.

It is further mutually agreed that any registered owner may likewise make such interest on any bond standing registered in his name, payable only to him or his order, by surrender of all coupons to such bonds annexed and representing the interest to become due thereon, which surrender when certified on such bond as aforesaid, shall not in any wise operate as a discharge to the Railway Company of its obligation to pay such interest as in said bonds provided, but payments of such interest shall nevertheless thereafter be made to the person appearing on such registry as the owner thereof, or his order, at the time such interest shall become payable, and any such payments so made shall be valid and effectual to satisfy and discharge the obligation for such interest to the extent of the sum or sums so paid.

ARTICLE TEN.—The Trustee shall have full power, in its discretion, and upon the written request of the said Railway Company, at any time to release from the lien and operation of this trust deed and of the said bonds, unto the Railway Company, or to persons by it designated therefor, any portion or portions of the premises acquired, held, or used by said Railway Company for the purpose of stations, depots, shops, or other buildings or erections or other uses not connected with the maintenance and operation of the railway or any part thereof, or which may have been acquired or held for the supply of gravel, fuel, and other materials for the purposes of said railway or any part thereof, which, in the judgment of the Trustee shall, at the time of such release, be no longer requisite for use for the purposes for which the same shall have been so acquired or used, nor necessary or expedient to be retained for use in connection with the said railway line, on or along the routes aforesaid, or any of them,

and likewise any parts of the original line of track or roadway, and of the depot grounds, buildings or accommodations connected therewith, which may have been thrown out of use, and ceased to form part of the railway, at the time of such release, by reason of straightening or alteration of the line of the road: *Provided always*, That the power of release given by this article is designed to be exercised only in case of the Railway Company's selling or contracting to sell the property so to be released, because of its being no longer required for the uses or purposes of said railway, and requiring the same to be so released, in order to give a perfect title to the purchaser or purchasers: *And provided, further*, That where such released premises shall have been thrown out of use, or ceased to be required, by reason of changes of the line of the road, on or along the routes aforesaid, or any of them, or change of depot grounds, buildings or other accommodations, the substitutes which the Railway Company shall have acquired therefor shall be conveyed by appropriate deeds to the Trustee upon the trusts and for the purposes of this indenture, before the giving of such release: *And it is further provided*, That the Trustee shall also have full power to allow the said Railway Company, from time to time, to dispose of, according to its discretion, such portion of the machinery, equipments, and implements, at any time held or acquired for the use of the said road, as may have become unfit for such use, provided the same be replaced by new, which shall be conveyed to the Trustee, or be otherwise made clearly subject to the operation of these presents.

That the said Trustee shall not be answerable for the default or misconduct of any agent or attorney who may be appointed by them in pursuance hereto, if such agent or attorney be selected with reasonable care; or for anything whatsoever, in connection with this trust, except misconduct or gross negligence; the said Trustee shall not be personally liable for any debts contracted by it, for damages to persons or property carried or injured, or for salaries, or non-fulfillment of contracts, during any period while said Trustee shall manage the trust property or premises upon

entry or voluntary surrender as aforesaid, but all such debts and liabilities shall be and constitute a first and paramount charge upon the trust funds and property.

It is mutually agreed that the term or words "the Trustee," "said Trustee," and "the said Trustee," as used in this indenture, shall be held and construed to mean the Trustee for the time being, whether original or new, and whenever a vacancy shall exist, to mean the continuing Trustee, and such Trustee shall, during such vacancy, be possessed of and be competent to exercise all the powers by these presents granted to the parties of the second part.

And it is further mutually agreed that the said Trustee, or any Trustee or Trustees hereafter appointed, may resign and be discharged of the trusts created by these presents by giving notice, in writing, to the said Company and to the bondholders, by publication thereof, at least twice a week, for six successive weeks, in a newspaper published in New York City, at least thirty days before such resignation shall take effect, and upon the due execution of the conveyance hereinafter required.

And it is further agreed that the Trustee may be removed at any time by an instrument in writing, under the hands and seals of a majority in interest of the holders of the bonds secured hereby and then outstanding, and in case a trustee should die, or should resign or be removed, as herein provided, or by a court of competent jurisdiction, a majority in amount of holders of the then outstanding bonds hereunder, shall have the right and power, by instrument in writing under their hands and seals, to appoint a new trustee to fill such vacancy, and until such appointment be so made by a majority of the bondholders, the board of directors of the Railway Company may appoint a new trustee to fill such vacancy for the time being, but subject to the right of removal by the holders of a majority of said bonds as already provided, and in either case the new trustee so appointed shall, while he continues as such, have and possess, and be subject to the like rights, power, estates, and duties as if he had been the original Trustee hereunder; and should any deeds, conveyances, or in-

struments in writing, to be executed, acknowledged and delivered on the part of the Railway Company, and the resigning or removed trustee, or either of them, be required by such new trustee, for more fully and certainly vesting in and confirming to him such estate, rights, powers, and duties, such deeds, conveyances, and instruments of writing shall on request be made, executed, acknowledged and delivered.

And it is further expressly understood and agreed that all the covenants, stipulations, promises, and agreements herein contained by or on behalf of said Company, shall bind and be binding upon its successors and assigns, whether so expressed or not.

ARTICLE ELEVEN.—If the said company shall well and truly pay or cause to be paid all bonds to be issued under or entitled to the protection of this deed of trust, and the coupons attached thereto, at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of these presents, then, and in that case, all property, rights, and interests hereby conveyed shall revert to the said Company, and the estate, right, title, and interest of the said Trustee aforesaid, shall thereupon cease, determine, and become void; otherwise the same shall be, continue, and remain in full force and virtue.

And inasmuch as it is intended that this indenture shall be simultaneously recorded in the proper office in each of the several counties of Texas and parishes of Louisiana wherein the railway property and premises conveyed hereby, or intended so to be, or some part thereof is situate, or as near at the same time as possible; this indenture further witnesseth that although twenty copies or counterparts thereof are simultaneously executed by the company under its corporate seal, attested by its president and secretary, in pursuance of a resolution of its board of directors, and delivered to the said Trustee; and the said Trustee, in evidence of its acceptance of the trusts thereby created, have likewise to each of said twenty copies or counterparts set their hands and affixed their seals simulta-

neously, to the end that one thereof may be recorded in each of said counties as aforesaid, all such copies or counterparts so executed and delivered, each as an original, shall constitute but one instrument.

ARTICLE TWELVE.—And this indenture witnesseth and it is further declared that this instrument, embracing property situate in the States of Texas and Louisiana, is intended in both States to be a mortgage of all the property hereinbefore described; and is intended to mortgage, hypothecate, and affect, and the parties of the first part do hereby mortgage, hypothecate, and affect the said property in the State of Louisiana unto and in favor of the party of the second part, as well as in favor of any present or future holder of said bonds or coupons, or any of them, for securing the payment thereof, and all other covenants of the mortgagors herein contained; so as to make this instrument as to all said property in the State of Louisiana a mortgage according to her laws and jurisprudence, and not an act of sale. And this indenture, so far as it embraces property situate in the State of Texas, is also intended to be a mortgage thereof according to her laws, for the purposes and upon the trusts in this indenture set forth.

IN WITNESS WHEREOF, The parties hereto have caused their respective corporate seals to be hereunto affixed and the same to be attested by the signatures of their respective Presidents and Secretaries, in pursuance of resolutions of their Boards of Directors, the day and year first above written.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By
JNO. C. BROWN,
1st Vice and Acting President.

Seal of The Texas and Pacific Railway Company.

Attest:
C. E. SATTERLEE,
Secretary.

Witnesses:
CHAS. BOURKE,
W. R. FIELD,
and
THOS. B. CLIFFORD,
Commissioner.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
By
E. B. WHEELOCK,
President.

Seal of The New Orleans Pacific Railway Company.

Attest:
ROBT. STRONG,
Secretary.

Witnesses:
J. R. EDGETT,
C. M. EUSTIS.

The Mercantile Trust Company, Trustee named in the foregoing indenture of mortgage, hereby accepts the trusts in the said mortgage declared and provided, and agrees to perform the same.

WITNESS the corporate seal of the Mercantile Trust Company of New York, this twenty-first day of February, one thousand eight hundred and eighty-eight.

THE MERCANTILE TRUST COMPANY.
By
LOUIS FITZGERALD,
President.

[SEAL]

Attest:
H. C. DEMING,
Secretary.

THE STATE OF NEW YORK, }
City and County of New York, } *ss.*

Before me, Thomas B. Clifford, a notary public in and for the city, county, and State aforesaid, this day personally appeared John C. Brown, who is personally known to me to be the person whose name is subscribed to the foregoing instrument, and to be first vice-president of the Texas and Pacific Railway Company, and acknowledged that he, as such vice-president, and by authority of said company, and as acting president (the president being now absent from the country), executed the same for said corporation and for the purposes and considerations therein expressed, and that the seal affixed thereto is the common or corporate seal of said corporation.

THOMAS B. CLIFFORD,

[SEAL] *Notary Public, City and County of New York.*

STATE OF NEW YORK, }
City and County of New York, }

BE IT REMEMBERED, That on the 20th day of Feb., A. D. one thousand eight hundred and eighty-eight, before me, the undersigned, Thos. B. Clifford, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, &c., and to take and certify depositions, personally appeared the above-named John C. Brown, the vice-president and acting president (the president being now absent from the country), and C. E. Satterlee, the secretary of the Texas and Pacific Railway Company, and executed the above instrument of writing in my presence, and that of the two witnesses whose names are thereto subscribed as such; and thereupon said John C. Brown, as vice-president and acting president, and said C. E. Satterlee, as secretary of said Texas and Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses, and purposes there mentioned, in their said respective capacities, and as the act and deed of said Texas and Pacific Railway Company.

And said Messrs. John C. Brown and C. E. Satterlee, being by me first duly sworn, did, each for himself, depose and say, that the said John C. Brown is the vice-president and acting president, and said C. E. Satterlee is the Secretary of the Texas and Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors, as and for the act and deed of said Texas and Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal of office, as commissioner aforesaid, at my office in said city of New York, on the day and date above written.

THOS. B. CLIFFORD,

[SEAL] *Commissioner of Deeds for the State of Louisiana in New York.*

STATE OF NEW YORK, }
City and County of New York, } ss.

BE IT REMEMBERED, That on the 20th day of Feb., Anno Domini one thousand eight hundred and eighty-eight, before me, the subscriber, a notary public in and for the City of New York aforesaid, personally appeared C. E. Satterlee, to me personally known, who, being duly affirmed according to law, deposes and says :—

That he is the secretary of the Texas and Pacific Railway Company, the corporation named in the above and foregoing indenture of mortgage; that he was personally present at the execution of the said indenture of mortgage, and saw the corporate seal of said company affixed thereto; that John C. Brown, the vice-president and acting president of the said company, did then sign, seal, and deliver the said indenture of mortgage as his act and deed and as the act and deed of said company, by virtue of the authority vested in him, as such vice president, and by a resolution of the board, to execute the same, and desire that the said indenture of mortgage might be recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time signed his name to the said indenture of mortgage as a subscribing witness thereto, and, as said secretary, in attestation of the due execution and delivery thereof, and that the names of the said vice-president and acting president and of this deponent subscribed to the said indenture of mortgage, as aforesaid, are of their own proper and respective handwriting.

Affirmed and subscribed before me, the day and year aforesaid.

W. R. FIELD,
[SEAL.] *Notary Public for New York.*

C. E. SATTERLEE.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

BE IT REMEMBERED, That on the 25th day of February, A. D. one thousand eight hundred and eighty-eight, before me the undersigned, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing, to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, &c., and to take and certify depositions, personally appeared the above-named E. B. Wheelock, the president, and Robert Strong, the secretary of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence, and that of the two witnesses whose names are thereto subscribed as such; and thereupon said E. B. Wheelock, as president, and said Robert Strong, as secretary, of said New Orleans Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses and purposes there mentioned, in their said respective capacities, and as the act and deed of said New Orleans Pacific Railway Company.

And said Messrs. E. B. Wheelock and Robert Strong, being by me first duly sworn, did, each for himself, depose and say, that the said E. B. Wheelock is the president, and said Robert Strong is the secretary of the New Orleans Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors, as and for the act and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed my seal of office, as notary public aforesaid, at my office in said city of New Orleans, on the day and date above written.

J. G. EUSTIS,
Notary Public.

[SEAL]

STATE OF LOUISIANA, }
City of New Orleans. }

Personally appeared before the undersigned, a duly appointed and qualified commissioner of the State of Texas, in and for the city and State aforesaid, the above-named E. B. Wheelock, the president, and Robert Strong, the secretary of the New Orleans Pacific Railway Company, and acknowledged in due form of law the aforegoing indenture to be their act and deed in their several capacities, and as and for the act and deed of the New Orleans Pacific Railway Company, and desired the same to be recorded as such. And said Robert Strong, being by me first duly sworn, did depose and say that he was personally present and did see the common or corporate seal of the above-named New Orleans Pacific Railway Company affixed to the foregoing indenture; that the seal so affixed is the common or corporate seal of said corporation; that the above-named E. B. Wheelock is the president of said corporation, and did sign the said indenture as such in the presence of deponent; that this deponent is the secretary of said corporation, and that the name of this deponent, within signed in attestation of the due execution of said indenture, is of this deponent's own handwriting, and that said indenture was signed by deponent as such secretary, and by said E. B. Wheelock, as president of the New Orleans Pacific Railway Company, under authority in them vested by the board of directors of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, as a commissioner of Texas, at New Orleans, Louisiana, this twenty-fifth day of February, in the year one thousand eight hundred and eighty-eight (1888).

(Signed) J. G. EUSTIS,

[SEAL] *Commissioner.*

Exhibit B.

EXPENDITURES MADE BY THE TEXAS AND PACIFIC RAILWAY COMPANY OUT OF ITS INCOME REMAINING AFTER PAYMENT OF ALL OPERATING EXPENSES, AS SHOWN BY ITS ANNUAL REPORTS.

(Interest on the Income Bonds not included below.)

Year Ended December 31, 1888:		
Interest on bonds	$916,791.67	
Rentals, interest, discount, etc.	73,460.78	
Taxes	143,213.00	
Expense prior to December 1, 1887	260,675.83	
Total		$1,394,141.28
Year Ended December 31, 1889:		
Interest on bonds	$1,279,490.00	
Taxes	173,116.89	
New equipment, including boats and barges	174,164.32	
Rentals and sundry expenses	109,664.62	
Total		$1,736,435.83
Year Ended December 31, 1890:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Taxes	188,360.75	
New Equipment	172,783.50	
Car Trust, Series B, due December 31st, 1890	131,000.00	
Real Estate, Terminal Property	86,600.00	
Sundry Expenses	26,074.36	
Total		$1,953,212.61

Year Ended December 31, 1891:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Car Trust Series "C"	131,000.00	
New equipment	11,987.80	
New buildings	69,314.53	
Taxes	190,129.22	
Sundries	13,174.95	
Total		$1,764,000.50
Year Ended December 31, 1892:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Interest and discount	16,050.94	
New equipment	146,638.05	
Taxes	193,265.33	
Cotton Wharf N. O.	28,488.00	
General office building	29,298.40	
Total		$1,762,134.72
Year Ended December 31, 1893:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Interest and discount	22,223.20	
New Equipment	112,023.37	
Taxes	203,607.06	
Cotton Wharf N. O.	20,795.16	
Total		$1,707,042.79
Year Ended December 31, 1894:		
Interest on bonds	$1,279,490.00	
Rentals	93,835.06	
Interest and discount	15,442.62	
New equipment	31,568.85	
Land purchased	1,565.00	
Taxes	199,448.60	
Settlement in Southern Pacific suit and judgments in suits pending prior to reorganization	244,907.12	
Total		$1,866,257.25

Year Ended December 31, 1895:		
Interest on bonds	$1,279,490.00	
Rentals	72,393.60	
Interest and discount	9,625.49	
Land purchased	1,858.00	
Taxes	212,223.41	
Cars purchased and built	182,633.15	
Total		$1,758,223.65
Year Ended December 31, 1896:		
Interest on bonds	$1,279,490.00	
Rentals	72,393.60	
Interest and discount	8,932.29	
Buildings purchased	6,000.00	
Taxes	210,092.41	
Cars purchased and built	206,286.57	
Total		$1,783,194.87
Year Ended December 31, 1897:		
Interest on bonds	$1,279,490.00	
Taxes	208,640.01	
Rentals	72,393.60	
New Depot, East Dallas	8,154.74	
Land for depot purposes	1,253.00	
Judgments in suits prior to reorganization	14,067.65	
Sundry accounts uncollectible and cancelled in compromise suits	44,384.32	
Locomotives and cars purchased and built:		
Locomotives $109,677.57		
Cars 136,938.82		
New machinery 1,869.00		
	248,485.39	
Total		$1,876,868.71

Year Ended December 31, 1898:			
Interest on funded debt		$1,285,277.50	
Taxes		211,153.41	
Lease rentals		72,393.60	
Sundry expenses, suits prior to reorganization, etc.		26,414.06	
Compromise Westwego Fire suit		117,500.00	
Locomotives and cars purchased and built:			
Locomotives	$121,905.38		
Cars	532,483.18		
New Transfer Boat N. O.	65,935.45		
		720,324.01	
New Cotton Wharf Westwego		43,669.95	
New machinery for shops		7,827.12	
Total			$2,484,559.65
Year Ended December 31, 1899:			
Interest on funded debt		$1,283,865.00	
Taxes		249,344.29	
Compromise, Westwego Fire suit		96,437.47	
New depot and other buildings at Fort Worth		323,146.51	
New Equipment:			
Locomotives	$75,027.13		
Cars	87,139.12		
Other equipment machinery	19,952.50		
		182,118.75	
Total			$2,134,912.02

Year Ended December 31, 1900:			
Interest on funded debt		$1,289,755.82	
Taxes		276,328.08	
New Buildings		31,419.02	
New car shops, Marshall		121,321.32	
Miscellaneous		20,264.38	
New equipment:			
Locomotives	$183,928.26		
Cars	286,488.37		
Other equipment and machinery	11,884.98	482,301.31	
Total			$2,221,390.23
Year Ended December 31, 1901:			
Interest on funded debt		$1,393,814.17	
Taxes		291,483.64	
New buildings and shops		249,932.07	
New equipment		676,419.00	
Total			$2,611,648.88
Year Ended December 31, 1902:			
Interest on funded debt		$1,428,459.17	
Taxes		284,514.39	
Westwego fire claims		163,641.94	
Sundries		37,423.59	
Total			$1,914,039.09
Year Ended December 31, 1903:			
Interest on funded debt		$1,473,354.16	
Taxes		296,052.72	
Interest and discount		408,949.10	
Improvement		273,264.25	
Equipment		568,121.23	
Sundries		21,659.79	
Total			$3,041,401.25

Year Ended December 31, 1904:		
Interest on funded debt	$1,490,015.00	
Taxes	312,296.96	
Interest and discount	104,669.32	
Improvements	700,584.28	
Equipment	571,648.94	
Sundries	45,245.28	
Total		$3,224,459.78
Year Ended December 31, 1905:		
Interest on funded debt	$1,507,785.00	
Taxes	345,438.16	
Interest and discount	123,400.35	
Improvements	557,595.19	
Equipment	570,522.89	
Sundries	32,462.79	
Westwego fire claims	164,140.40	
Total		$3,301,344.78
Year Ended December 31, 1906:		
Interest on funded debt	$1,475,650.00	
Taxes	333,763.63	
Interest and discount	172,310.25	
Improvements	919,154.52	
Equipment	599,420.41	
Sundries	51,160.48	
Total		$3,551,459.29
Year Ended December 31, 1907:		
Interest on bonds	$1,493,625.00	
Taxes	604,099.73	
Interest and discount	188,488.85	
Improvement account	1,098,486.75	
Equipment account	1,128,249.45	
Sundry items	87,517.39	
Total		$4,600,467.17

Year Ended December 31, 1908:		
Taxes	$558,428.53	
Interest on bonds	1,498,500.00	
Interest and discount	331,330.03	
Improvement account	304,803.19	
Equipment account	600,784.61	
Sundry items	197,463.60	
Total		$3,491,309.96
Year Ended December 31, 1909:		
Taxes	$535,575.72	
Interest on bonds	1,498,500.00	
Interest and discount	323,866.43	
Improvement account	360,174.72	
Equipment account	660,413.79	
Sundry items	42,674.97	
Total		$3,421,205.63
Year Ended December 31, 1910:		
Taxes	$596,636.18	
Interest on funded debt	1,498,350.00	
Interest on equipment obligations	75,350.00	
Other interest	268,580.70	
Rentals	103,129.57	
Improvement and equipment account	1,220,599.55	
Total		$3,762,646.00
Year Ended December 31, 1911:		
Taxes	$664,815.14	
Interest on funded debt	1,498,400.00	
Interest on equipment obligations	135,737.50	
Other interest	231,218.27	
Rentals	127,227.12	
Hire of equipment balance	34,708.09	
Miscellaneous	43,020.36	
Improvement and equipment account	1,219,636.91	
Total		$3,954,763.39

Year Ended June 30, 1912:		
Taxes	$728,070.32	
Interest on funded debt	1,498,000.00	
Interest on equipment obligations	123,862.50	
Other interest	213,991.89	
Rentals	119,221.47	
Hire of equipment balance	180,693.45	
Improvements	597,517.67	
New equipment	751,529.01	
Total		$4,212,886.31
Year Ended June 30, 1913:		
Taxes	$693,441.21	
Hire of equipment	116,429.85	
Joint facility rent deductions	101,756.63	
Miscellaneous rent deductions	19,473.73	
Interest on funded debt	1,637,251.86	
Interest on unfunded debt	283,717.62	
Additions and betterments	1,352,183.05	
Total		$4,204,253.95
Year Ended June 30, 1914:		
Taxes	$757,340.98	
Hire of equipment	339,871.11	
Joint facility rent deductions	118,853.62	
Miscellaneous rent deductions	16,585.00	
Loss on separately operated properties	1,580.02	
Interest on funded debt	1,600,015.02	
Interest on unfunded debt	204,909.31	
Additions and betterments	641,568.93	
Maturing equipment obligations paid	466,500.01	
Total		$4,147,224.00

Year Ended June 30, 1915 :

Taxes		$856,136.10	
Uncollectible Railway Revenues		5,462.53	
Deductions from gross income:			
Hire of freight cars—balance	$475,091.39		
Rent for locomotives	4,131.37		
Rent for passenger train cars	47,807.11		
Rent for work equipment	731.98		
Joint facility rents	137,426.90		
Miscellaneous rents	19,139.25		
Miscellaneous tax accruals	14,364.23		
Loss on separately operated properties	5,330.92		
Interest on funded debt	1,575,354.55		
Interest on unfunded debt	221,947.81		
Maintenance of investment organization	452.90		
Miscellaneous income charges	10,919.11		
		2,512,697.52	
Additions and betterments		287,773.99	
Maturing equipment obligations paid		457,000.00	
Total			$4,119,070.14

101 *Motion to Dismiss of the New Orleans Pacific Railway Company.*

Filed January 31, 1916.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

In Equity. No. 2795-51.

BANKERS TRUST COMPANY, as Trustee, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, Defendants.

Motion to Dismiss of the New Orleans Pacific Railway Company.

Now comes the New Orleans Pacific Railway Company, one of the defendants named in the above styled and numbered cause and moves the Court to dismiss this cause as to it and decree that this Court has no jurisdiction to maintain this cause of action as against this defendant within this District, to-wit: The Northern District of Texas, for the following grounds and reasons:

First. It says that this Court has no jurisdiction to maintain this cause of action as against it within this District, to-wit, The Northern District of Texas, in that it appears from complainant's bill that this defendant is a railway corporation chartered and existing under the laws of the State of Louisiana and is a citizen of the State of Louisiana and an inhabitant and a resident of
102 the Eastern District of Louisiana with principal and general offices located in the City of New Orleans, State of Louisiana, and it further appears from complainant's bill that this defendant has no substantial interest in the matters and things involved in the controversy herein and is not a necessary or proper party hereto.

Second. It further appears from the allegations in complainant's bill that this defendant neither has at this time nor did it ever at any time own, possess or have any interest whatsoever in any of the property of the Texas and Pacific Railway Company located in the Northern District of Texas or within the State of Texas.

Third. It further appears from complainant's bill that this defendant has no interest, right or possession in any of the property involved in this suit, situated within the State of Louisiana or elsewhere and it is not alleged or claimed in said bill that this defendant is claiming any right, title, claim, interest or possession in or to any of the property involved in this suit either in the State of Texas or in the State of Louisiana or elsewhere and it further appears from said allegations that this defendant is not in possession or control of any of said property either in the State of Texas or in the State of Louisiana or elsewhere.

Fourth. It affirmatively appears from the allegations of complainant's bill that whatever property it may have any time owned, claimed or possessed, as described in the said bill of complaint, was located wholly within the State of Louisiana, and it further affirmatively appears from said allegations that this defendant on or about the 20th day of June, 1881, sold and conveyed all of its rights, privileges, franchises and property described and involved in this suit, to its co-defendant, The Texas and Pacific Railway Company, and as alleged in said bill, all of said property, rights, privileges and franchises are now vested in and is absolutely the property of the defendant, The Texas and Pacific Railway Company, and that this defendant is not in possession of any of the said properties so described in complainant's bill and is not setting up any claim thereto in any manner whatsoever and it further affirmatively appears that the second mortgage bonds upon
103 which the complainant sues, were, on or about the 1st day of February, 1888, and long after this defendant parted with its title and possession to the property covered by said mortgage bonds.

Fifth. The allegations in the complainant's bill fail to show any state of facts which makes this defendant a proper or necessary party to this suit.

Wherefore defendant prays that this motion to dismiss be granted and its plea herein presented be sustained and that it be dismissed without costs.

GEORGE THOMPSON,
FLIPPIN, GRESHAM & FREEMAN,
Solicitors for Defendant, New Orleans Pacific Railway Company.

THOMAS J. FREEMAN,
Of Counsel.

104 *Motion to Dismiss of the Texas and Pacific Railway Company.*

Filed January 31, 1916.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

In Equity. No. 2795-51.

BANKERS TRUST COMPANY, as Trustee, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, Defendants.

Now comes the Texas and Pacific Railway Company, one of the defendants named in the above styled cause, and moves the Court to dismiss the bill of complaint herein as to this defendant, upon each of the following grounds:

First. It appears from the complainant's bill herein that this Court is without jurisdiction to entertain this cause.

Second. The allegations of complainant's bill herein failed to allege a state of facts or any conclusions of law that give to this Court jurisdiction to entertain this cause of action as against The Texas and Pacific Railway Company.

Third. It appears from the allegations in complainant's bill herein that this Court is wholly without jurisdiction to hear and determine the issues involved or to render any binding or effective judgment herein.

Fourth. Because it appears from complainant's bill herein that this suit is not one between citizens of different states. It appears from the bill herein that the complainant is a resident and
105 citizen of the State of New York, the New Orleans Pacific Railway Company, a co-defendant herein, is a resident and citizen of the State of Louisiana and this defendant is a corporation incorporated under and by virtue of an Act of Congress of the United States.

Fifth. Because it further appears that the complainant is a citizen of the State of New York and the Texas and Pacific Railway Company is a corporation created under an Act of Congress of the United States and the New Orleans Pacific Railway Company is a corporation created under the laws of the State of Louisiana and a citizen and resident of the State of Louisiana and it further appears that the New Orleans Pacific Railway Company has no real or substantial interest in this cause, that no judgment is sought against the New Orleans Pacific Railway Company in any action of debt either upon the bonds sued upon herein or upon any interest alleged to be due upon said bonds. That complainant's bill shows that no part of the railway of this defendant in Texas and within the Northern District of Texas was ever owned by or claimed to be owned by the New Orleans Pacific Railway Company. That it appears from complainant's bill that the New Orleans Pacific Railway Company has no interest in the property involved in this cause. That it further appears from the complainant's bill that the New Orleans Pacific Railway Company never had any interest in the property of this defendant located in the State of Texas and within the jurisdiction of this Court and it further appears from the complainant's bill that whatever interest the New Orleans Pacific Railway Company may have had in the property and line of road of this defendant within the State of Louisiana or elsewhere, said New Orleans Pacific Railway Company has long since parted with said interest by due conveyance to this defendant and the said New Orleans Pacific Railway Company is not now claiming any interest in said property of this defendant either in Texas or in Louisiana. That the New Orleans Pacific Railway Company is not interested in the property involved in this litigation and is not a real party in interest hereto.

Sixth. It further appears from complainant's bill that this is not a civil suit or controversy arising under the Constitution of the United States or any law of the United States.

106 Seventh. Because complainant's bill fails to allege or show any facts which confer upon this Court jurisdiction to hear and determine the issues involved in this cause.

Eighth. It appears from complainant's bill herein that jurisdiction is sought to be obtained in this Court over The Texas and Pacific Railway Company solely upon the ground that such company is incorporated under an Act of Congress and this defendant states that this Court is without jurisdiction to entertain this suit upon such ground because and by virtue of the terms of an Act of Congress approved January —, 1915, which reads as follows: "No court of the United States shall have jurisdiction of any action or suit by or against any railway company upon the ground that such railway company was incorporated under an Act of Congress."

Ninth. Because complainant's bill fails to allege or show any facts which in law or equity would entitle the complainant to the relief or any part thereof as prayed for.

Tenth. It further appears from complainant's bill that if complainant has any cause of action, said cause of action is one at law and not in equity.

Wherefore for these and other good reasons appearing upon the face of complainant's bill, this defendant asks that this cause be dismissed.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
FLIPPIN, GRESHAM & FREEMAN,
Solicitors for the Defendant The Texas and Pacific Railway Company.

CHADBOURNE & SHORES,
Of Counsel.

107 *Back of Original Answer of Defendant, The Texas & Pacific Railway Company's Original Answer, Filed* 31 *Day of Jan.*, 1916.

No. 2795-51. In the District Court of the United States for the Northern District of Texas, Dallas Division. Bankers Trust Company, as Trustee, Complainant, against The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, Defendants. Answer of Defendant The Texas and Pacific Railway Co. (Original.) Filed 31 day of Jan. 1916. Louis C. Maynard, Clerk.

108 *Title Page of Defendant, The Texas & Pacific Ry. Company's Amendments to Its Original Answer, Filed Feb.* 16, 1916.

In the District Court of the United States, within and for the Northern District of Texas, Dallas Division. Bankers Trust Company, as Trustee, Complainant, against The Texas & Pacific Railway Company and New Orleans Pacific Railway Company, Defendants. In Equity No. 2795/51. Amendments of Defendant, The

Texas & Pacific Ry. Co. to its answer filed Jan. 31, 1916. Thomas J. Freeman, George Thompson, Flippen, Gresham & Freeman, Solicitors for Defendant, The Texas & Pacific Railway Company. Chadbourne & Shores, of Counsel. Filed 16 day of Feb. 1916. Louis C. Maynard, Clerk.

109 *Amended Answer.*

Filed Feb. 16, 1916.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

In Equity. No. 2795-51.

BANKERS TRUST COMPANY, as Trustee, Complainant,
against
THE TEXAS & PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, Defendants.

Amended Answer of the Defendant The Texas & Pacific Railway Company.

Now comes the Texas and Pacific Railway Company, one of the defendants named in the above styled cause and for answer thereto says:

That this Court is without jurisdiction as against this defendant to hear and determine the issues involved and that no cause of action is stated against this defendant for the following reasons:

I.

First. It appears from the complainant's bill herein that this Court is without jurisdiction to entertain this cause.

Second. The allegations of complainant's bill herein failed to allege a state of facts or any conclusions of law that give to
110 this Court jurisdiction to entertain this cause of action as against The Texas and Pacific Railway Company.

Third. It appears from the allegations in complainant's bill herein that this Court is wholly without jurisdiction to hear and determine the issues involved or to render any binding or effective judgment herein.

Fourth. Because it appears from complainant's bill herein that this suit is not one between citizens of different states. It appears from the bill herein that the complainant is a resident and citizen of the State of New York, the New Orleans Pacific Railway Company, a co-defendant herein, is a resident and citizen of the State of Louisiana and this defendant is a corporation incorporated under and by virtue of an Act of Congress of the United States.

Fifth. Because it further appears that the complainant is a citizen

of the State of New York and The Texas and Pacific Railway Company is a corporation created under an Act of Congress of the United States and the New Orleans Pacific Railway Company is a corporation created under the laws of the State of Louisiana and a citizen and resident of the State of Louisiana, and it further appears that the New Orleans Pacific Railway Company has no real or substantial interest in this cause, that no judgment is sought against the New Orleans Pacific Railway Company in any action of debt either upon the bonds sued upon herein or upon any interest alleged to be due upon said bonds. That complainant's bill shows that no part of the railway of this defendant in Texas and within the Northern District of Texas was ever owned by or claimed to be owned by the New Orleans Pacific Railway Company. That it appears from complainant's bill that the New Orleans Pacific Railway Company has no interest in the property involved in this cause. *That it further appears from the complainant's bill that the New Orleans Pacific Railway Company.* That it appears from complainant's bill that tdefendant located in the State of Texas and within the jurisdiction of this Court and it further appears from the complainant's bill that whatever interest the New Orleans Pacific Railway Company may have had in the property and the line of road of this defendant within the State of Louisiana or elsewhere, said New Orleans Pacific Railway Company has long since parted with said
111 interest by due conveyance to this defendant and the said New Orleans Pacific Railway Company is not now claiming any interest in said property of this defendant either in Texas or in Louisiana. That the New Orleans Pacific Railway Company is not interested in the property involved in this litigation and is not a real party in interest hereto.

Sixth. It further appears from complainant's bill that this is not a civil suit or controversy arising under the Constitution of the United States or any law of the United States.

Seventh. Because complainant's bill fails to allege or show any facts which confers upon this Court jurisdiction to hear and determine the issues involved in this cause.

Eighth. It appears from complainant's bill herein that jurisdiction is sought to be obtained in this Court over the Texas and Pacific Railway Company solely upon the ground that such company is incorporated under an Act of Congress and this defendant states that this Court is without jurisdiction to entertain this suit upon such ground because and by virtue of the terms of an Act of Congress approved January —, 1915, which reads as follows: "No court of the United States shall have jurisdiction of any action or suit by or against any railway company upon the ground that such railway company was incorporated under an Act of Congress."

Ninth. Because complainant's bill fails to allege or show any facts which in law or equity would entitle the complainant to the relief or any part thereof as prayed for.

Tenth. It further appears from complainant's bill that if complainant has any cause of action, said cause of action is one at law and not in equity.

For further answer, if so required, it says:

II.

It admits the allegations of Paragraph 1 of the bill of complaint to be substantially true as alleged.

III.

It admits as true so much of Paragraph 2 of the bill of
112 complaint as alleges that the Texas and Pacific Railway Company is a corporation duly created by and existing under the laws of the United States of America, that is, it admits it is a railway corporation created by and existing under the laws of the United States of America, it does not admit that its principal place of business and its principal operating and general offices are in the City of Dallas, State of Texas, in the Dallas Division of the Northern District of Texas, but does admit that one of its general offices and one of its principal operating offices is located in the City of Dallas, in the State of Texas, and in the Dallas Division of the Northern District of Texas. It further admits the allegations of Paragraph 2 to the effect that a material and substantial part of the railroads owned and operated by it are located in the Northern District of Texas, but it expressly denies that it is a resident and inhabitant of the said Dallas Division of the Northern District of Texas, and it now alleges that it is not a citizen of the State of Texas.

IV.

It admits the allegations contained in Paragraph 3 of complainant's bill as substantially true.

V.

As to the allegations contained in Paragraph 4 of complainant's bill, defendant says:

It admits the enactment by Congress of the Act approved on or about March 3, 1871, and the Act approved on May 2, 1872; it does not admit the allegations which are conclusions of law, that by virtue of said Acts or either of them, jurisdiction of this cause was conferred upon this Court and that this Court continues to have and still has jurisdiction thereof. As it is advised and believes, defendant says that this Court by virtue of the said Acts, has never had and does not now have jurisdiction of this cause and if mistaken in that, it says that if jurisdiction was ever conferred upon this Court to hear and determine issues as involved herein, that said jurisdiction was
taken away from this Court by virtue of an Act of Congress
113 approved January 28, 1915, which provided substantially as follows: "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress," and defendant now says that if jurisdiction was ever conferred upon this Court to hear and determine issues of the

kind involved in this cause, that said jurisdiction ceased and was withdrawn by virtue of the said Act of Congress aforesaid and defendant therefore submits that this Court is wholly without jurisdiction to hear and determine the issues. That this defendant is a railroad company incorporated under an Act of Congress and the provisions of the Act of Congress recited in Paragraph 4 of complainant's bill constitutes a part of the Charter of this defendant and the jurisdiction of this Court is invoked solely and alone in this cause upon the ground that this defendant was incorporated under an Act of Congress, to-wit: the Acts of Congress set forth in Paragraph 4 of complainant's bill. Defendant further says that the provision in said Act referred to, providing that the Texas and Pacific Railway Company as incorporated should be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States, was not intended to and did not give this Court jurisdiction of this cause.

VI.

It admits as true the allegations contained in Paragraph 5 of the bill of complaint.

VII.

It admits as true the allegations contained in Paragraph 6 of complainant's bill.

VIII.

It admits as true the allegations contained in Paragraph 7 of the complainant's bill.

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IX.

It admits as true the allegations contained in Paragraph 8 of complainant's bill.

X.

It admits as true the allegations contained in Paragraph 9 of complainant's bill.

XI.

It admits the allegations contained in Paragraph 10 of complainant's bill are substantially correct, but it calls for the specific documents mentioned therein as being the best evidence of the terms and conditions embodied in the same. This defendant would aver, however, that the allegations contained in said Articles of Consolidation set forth in said paragraph 10, "That the franchises of the New Orleans and Pacific to be and remain a corporation" did not relate to its franchises to operate a railway, but only apply to its franchises over other property owned by it other than its railway properties and railway franchises, that all of its railway properties and railway franchises were conveyed to this defendant the Texas and Pacific Railway Company and this defendant has owned and possessed same and is now the owner and in possession of same since the date of said

Articles of Consolidation and said New Orleans Pacific Railway Company is not claiming any of the railway properties conveyed by it to said The Texas and Pacific Railway Company under said Articles of Consolidation nor any of the railway franchises conveyed by it to this defendant under and by virtue of said Articles of Consolidation.

XII.

It admits as true the allegations of fact in Paragraph 11 of complainant's bill.

XIII.

This defendant admits the allegations in Paragraph 12 to be substantially as alleged, but calls for the introduction of the
115 bonds therein mentioned and the mortgage therein mentioned as the best evidence of their terms and conditions, and it refers to the full statements and conditions set forth and contained in said bonds and in said mortgage for a full, true an- correct statement of all the provisions and restrictions therein contained.

XIV.

This defendant admits the allegations of Paragraph 13 to be substantially true, but calls for the introduction of the second mortgage and the bonds issued in pursuance thereof as the best evidence of their terms and conditions, and it refers to the full statements and conditions set forth and contained in said bonds and in said mortgage for a full, true and correct statement of all the provisions and restrictions therein contained.

XV.

This defendant admits the allegations contained in Paragraph 14 of complainant's bill as substantially true, but calls for the introduction of the mortgage as the best evidence of its terms and conditions and as containing a full, true and correct statement of all its terms and conditions.

XVI.

This defendant admits the allegations contained in Paragraph 15 of complainant's bill as true.

XVII.

This defendant is without knowledge of the facts contained in Paragraph 16 of complainant's bill.

XVIII.

Defendant admits the allegation of fact contained in Paragraph 17 of complainant's bill, but does not admit the conclusions
116 of law or the inferences drawn therefrom, and it refers to the said second mortgage itself as evidencing all of its terms, conditions and obligations.

XIX.

Defendant admits that since the date of execution and delivery of the second mortgage, Exhibit A to complainant's bill, it has from time to time acquired certain other property, real and personal, but on information and belief it denies that said property so acquired became subject to the lien of said second mortgage, and it denies the right of the complainant herein to require of this defendant an accounting for all such property or any part thereof, and demands strict proof that all or any part of such property subsequently asquired was subject to the lien of said second mortgage.

XX.

This defendant admits that a large amount of the twenty-five million dollars face value of the income bonds covered by said second mortgage, as mentioned in Paragraph 19 of complainant's bill, were duly authenticated by the Mercantile Trust Company, but it denies that the entire twenty-five million dollars face value of said income bonds are now outstanding. It avers as a fact that said second mortgage bonds to the extent of three hundred twenty-three thousand eight hundred and seventy-five ($323,875.00) dollars are not outstanding, but are still held in the treasury of this company. Defendant is without knowledge as to whether the bonds issued are now outstanding in the hands of bona fide holders for value.

XXI.

This defendant admits the allegations contained in Paragraph 20 of complainant's bill as substantially true, but calls for the introduction of the documents therein mentioned as the best evidence of the facts therein recited.

XXII.

Answering the allegations and statements made in Paragraph 21 of complainant's bill, defendant says: it does not admit that
117 the interest on the income bonds commenced to accrue on the 1st day of December, 1887, but denies same. Defendant admits that subsequently to the 1st day of December, 1887, and for each annual period thereafter ending December 1st it did receive amounts of income remaining after the payment of its total operating expenses as will be more fully and completely hereinafter shown. Defendant is not advised as to what is intended to be meant in the allegations in said paragraph 21 where it is averred that it received large amounts of income remaining after the payment of total operating expenses, and defendant is not to be understood as admitting any statement or conclusion of the complainant as to what is meant by the payment of its total operating expenses, as will be more fully hereinafter explained. Referring to the allegation in said Paragraph 21 as to what the annual reports of the board of directors to the stockholders of this defendant show, defendant says that said reports are the best evidence of the statements therein made, and it calls for the

introduction of same. Defendant denies the allegation that said annual reports for the annual period ending December 31st for the years 1888 to 1911 inclusive and for annual periods ending June 30th for the years 1911 to 1915 inclusive, are correctly stated in said allegations. It is alleged that for the year ending December 31, 1888, that said report shows an income remaining after the payment of all operating expenses the sum of $1,576,866.21. Defendant says that this is untrue. It avers that said annual report for the year ending December 31, 1888, shows that the total gross income from all sources for said year amounted to $6,374,386.27, and it further shows that there was added to the said income the sum of $130,936.21, which defendant avers to have been brought forward from the year ending December 31, 1887, so that there was a total gross income of all kinds at the end of the year December 31, 1888, the sum of $6,505,322.48. Said report shows, which defendant avers to be a fact, that the actual operating expenses were $4,928,556.27. By taking the amount named as the total income as stated and taking therefrom the actual operating expenses as stated, the amount of $1,576,868.21 is left. Defendant, however, denies as alleged in said Paragraph 21 that this is the income remaining after the payment of all operating expenses. According to the report and which is herein
118 averred to be true, there was paid out additional sums as follows:

For taxes	$143,213.00
Interest on first mortgage bonds	915,791.87
Other expenses	260,675.83
Rentals	75,460.78
Leaving a balance stated in the report as applied to betterments of	182,724.93
Making a total of	$1,576,866.21

Defendant avers that in truth and fact, that of the amount stated as applied to betterments there was the sum of $179,138.75 actually used and spent for betterments, leaving a net income of $3,586.18 on December 31, 1888, all of which will more fully be shown at the hearing of this cause. Concerning the allegation made in said Paragraph 21 that for the year ending December 31, 1889, there remained as income after the payment of all operating expenses as shown by said reports the sum of $2,023,769.85, defendant says that same is not true. In explanation of said allegation on the part of the complainant it is here stated that complainant in arriving at this statement, took from the report the actual gross income from freight, passenger, mail, express and miscellaneous amounting to $6,917,802.84; from this it deducted actual operating expenses as shown in said report in the amount of $5,072,942.10, thus leaving a balance of $1,844,860.74. To this sum complainant adds the additional sum of $178,909.11 in order to arrive at the statement that $2,023,769.85 was the total net income as claimed. Defendant avers as a fact that there was included in this item $178,909.11 as of net income derived

from the operation of the road for the year ending December 31, 1888, when in truth and fact said certain income for the year 1889 was $175,322.93, which would make the true income with the exceptions hereinafter stated the sum of $2,020,183.67. Defendant avers, however, and as shown by the report there was paid out for taxes, interest on bonds, new equipment, rentals and sundry expenses, the sum of $1,736,435.53, which left the actual balance of $283,748.14, instead of the amount shown. As to the allegations of the income for the year ending December 31, 1890,

119 defendant says that this is true subject to the statement that complainant only took into account the gross operating rental and other income and only deducted the actual expense of operation and did not take therefrom any other expense or expenditure, when in truth and fact there should have been deducted from same the amount paid out as interest on the first mortgage bonds, rentals, taxes and other expenses as shown by said annual report, so that there was in truth and fact left after making such expenditures a net income of $249,662.54, and defendant here avers that for and during said year it spent in additions and betterments and reserved for additions and betterments, which it alleges it had a lawful right to do, the sum of $395,763.22, so that in truth and fact there was a deficit of operation as stated for the year ending December 31, 1889, the sum of $146,690.83. The allegation made in said Paragraph 21 as to the amount of income for the year ending December 31, 1891, and as shown by the reports, defendant says that the same is true subject to qualification and explanation that complainant took into account only the gross operating, rental and other income and only deducted the actual expenses of operation and did not take therefrom any other expenses or expenditure which should have been deducted, such as interest on bonds, amounts expended for rentals, taxes and other expenses as shown by said annual report, so that in truth and fact, after deducting all of such charges there was left the sum of $33,019.80 and not the amount stated by complainant. As to the right and power of the defendant to make said expenditures and payments, reference will be had to allegations to be hereinafter made. Subject to qualifications and explanations hereinafter made, defendant says that the amount of income for the years ending December 31, 1892, to December 31, 1911, inclusive, and for the years ending June 30th, 1912, to June 30th, 1915, inclusive, are substantially correct, though defendant reserves the right to test the accuracy of any of the figures stated. Defendant, however, denies the allegation that the amount stated represented an income remaining after the payment of all operating expenses for the respective years. Defendant says that there should have been deducted from the gross income for each particular year the amount expended for taxes, interest on first and second mortgage bonds, as

120 same was expended, and all other necessary and proper expenses as shown by said reports, and defendant here now states that if all proper expenditures, payments and reserva-

tions had been deducted from said gross income, the true balances for each respective year would have been as follows:

Year ending December 31, 1888, Surplus	$3,586.88
Year ending December 31, 1889, Surplus	283,748.14
Year ending December 31, 1890, Deficit	146,690.68
Year ending December 31, 1891, Surplus	33,019.80
Year ending December 31, 1892, Surplus	143,457.11
Year ending December 31, 1893, Surplus	527,097.43
Year ending December 31, 1894, Surplus	268,335.94
Year ending December 31, 1895, Surplus	154,971.83
Year ending December 31, 1896, Deficit	6,011.86
Year ending December 31, 1897, Surplus	447,969.15
Year ending December 31, 1898, Surplus	31,152.64
Year ending December 31, 1899, Surplus	446,982.84
Year ending December 31, 1900, Surplus	762,277.70
Year ending December 31, 1901, Surplus	557,457.41
Year ending December 31, 1902, Deficit	1,651,155.70
Year ending December 31, 1903, Deficit	223,177.67
Year ending December 31, 1904, Deficit	75,066.82
Year ending December 31, 1905, Deficit	30,763.74
Year ending December 31, 1906, Surplus	330,433.92
Year ending December 31, 1907, Deficit	629,992.51
Year ending December 31, 1908, Deficit	598,332.76
Year ending December 31, 1909, Surplus	688,648.02
Year ending December 31, 1910, Surplus	695,760.34
Year ending December 31, 1911, Surplus	188,947.50

Defendant denies the statements as to the income balance for the years ending June 30, 1912, 1913, 1914 and 1915. Defendant says and as will be more fully and completely shown on the hearing of this cause, that for the year ending December 31, 1912, after deducting from the gross income all proper expenditures, charges and credits and amounts expended for additions and betterments there was a deficit left of the sum of $1,397,696.37 and that likewise for the year 1913 there was a balance left of $85,967.94 and for the year 1914 there was a balance of $165,441.36, and for the first eleven months of the year 1915 there was a deficit of $833,816.85. Defendant here avers that on the hearing of this cause it will produce its books or true and correct statements therefrom showing fully and completely the amounts of its gross income and the amount of its true and lawful expenditures, and it avers that said balances will appear substantially as alleged in this answer and will not be as complainant has in its bill alleged, and defendant here now expressly denies any allegation of complainant that is not in accordance with the facts as alleged herein by this defendant. If it be true that the interest-bearing period of said second mortgage bonds began on the 1st day of December, 1887, which is not admitted but denied, or if it be true that the interest-bearing period on said mortgage bonds was from the 1st day of December of any particular year to the 1st day of December

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of the year following, defendant says that as it is informed and believes, it will be necessary to have a statement of the financial accounts of this defendant for each period beginning December 1st, 1887, and ending December 1st, 1888, and for each annual period thereafter, and defendant says that it will have a statement of said kind made and produced at the hearing of this cause. As will be seen from the reports of the directors made to the stockholders and referred to in complainant's bill, the practice and custom has been to make a statement of the financial affairs of this company for a yearly period beginning from the 31st day of December of each year to the 31st day of December of the succeeding year up to and including the year ending December 31, 1911, and after that reports were made of the fiscal affairs of said company ending June 30th of each year. Defendant here says that neither this complainant nor its predecessors nor any holder or owner of said second mortgage bonds or any of them has or have ever demanded of this company a statement of its fiscal affairs for periods running from December 1st to December 1st of the next succeeding year, but said statements and reports and accounts have been made in annual periods for the calendar years ending December 31st until the year 1912, when said statements were made for the fiscal years ending June 30th. Defendant says that since the filing of this bill and the service of processes upon it it has not had the time to prepare statements and exhibits showing the income and expenditures for the years ending December 31st of each year, but it says that it will have same prepared and will produce same at the hearing of this cause. Defendant is not now prepared to say
122 what substantial difference, if any, there will be with reference to incomes, expenditures and balances treated as of the year ending December 1st, as compared with the manner in which said accounts have been stated, but it says upon information and belief that the net balance will be substantially the same though it reserves the right to show the true and correct balances for each particular year. It denies, however, the allegation in Paragraph 21 that it received during each annual period of the income bonds ending December 1st of each year a large amount of income remaining after the payment of its total expenses. Defendant admits upon belief and information that it did receive during each annual period from the 1st day of December, 1887, and down to the present, certain amounts of income over and above the payment of total operating expenses, the exact amount, as hereinbefore stated, defendant is not prepared to say, but in this connection it expressly avers that after taking from said income all of its operating expenses, taxes, betterments, improvements and all expenditures and credits which it was legally entitled to make and deduct, that the amounts will not be as stated by complainant.

Defendant says that in its statements herein made as to expenditures, deductions, surplus, deficit and net income, it has reference to the statements made in the printed annual reports. Defendant says in truth and fact said annual reports do not show all of the expenditures made from time to time, and do not show, in all instances,

the true and correct balance, or the true and correct deficit. It says that in various and sundry years large sums of money are expended by this Defendant for improvements, betterments, equipments and various and sundry other items and accounts, and for which expenditures this Defendant was entitled to deduct and has deducted from its gross income before any income bondholders should be paid anything on account of interest on said bonds.

Defendant says the allegations made in this paragraph concerning income, net income, surplus and deficit, *has* reference to the said printed annual reports, and it is not to be understood as admitting that the surplus, income or net income, or deficit referred to in the printed annual reports are the actual facts as same existed, but says that there should be deducted from the gross in-
123 come various other additional amounts which were properly expended and should be properly deducted from the gross income.

XXIII.

This defendant admits as true the allegations contained in Paragraph 22 of the bill of complaint and states that with the exception of interest therein set forth as paid, no interest was due or payable upon said bonds according to their terms and effect and no interest was declared to be due and payable thereunder by the board of directors as is provided in said second mortgage.

XXIV.

Defendant denies the allegation in Paragraph 23 of the bill that at the expiration of each of the annual interest periods of the income bonds for the years therein mentioned below, there remained in possession of this defendant out of said income after payment of all expenditures and charges, a surplus consisting of large sums of money. Defendant says that a true and correct statement of the accounts of this company will show that for the years ending December the 1st of each year beginning December 1st, 1888, down to the present time, that for some of said years there was a surplus and for other of said years there was a deficit. Defendant, as hereinbefore explained, has not had its reports made for the years ending December 1st, but as hereinbefore set forth. Defendant, however, at the hearing of this cause will furnish its books or a true and correct statement or statements of same showing the surplus, if any, for each particular year and the deficit for each particular year ending December 1st instead of December 31st, but it here now states that full and complete payments have been made to the holders of the second mortgage bonds of all sum or sums to which said holders were entitled. Referring to the allegation in said Paragraph 23 as to the contents of the annual reports of the board of directors and the amount shown therein as a surplus remaining in the possession of the defendant company at the expiration of each annual period ending December 31st, for the years mentioned in said Paragraph

23 and for the years ending June 30th, for the years men-
124 tioned in said Paragraph 23, defendant says: it denies that the amount of the surplus for the year ending December 31, 1888, was as stated, to-wit: $182,724.93, and it denies that the amount of surplus for the year ending December 31st, 1889, was for the sum of $287,824.00. As in this answer hereinbefore stated, the truth and fact is that the surplus for the year ending December 31, 1888, was the sum of $3,586.18, and for the year 1889 was $283,748.14. The amount stated for the year ending December 31st, 1891, is correct. The same is true for the years ending December 31, 1893, 1894, 1895, 1897, 1898 and 1899. It denies the allegation that for the year ending December 31st, 1900, there was a surplus of $1,137,277.70. The true surplus for that year *and* as shown by the said annual reports was the sum of $762,277.80. The difference between the amount stated by complainant and the amount herein stated is apparent when it is considered that complainant failed to deduct from the surplus as claimed by it the sum of $375,000.00, the amount paid out as interest on the second mortgage bonds. It denies the statement as to the surplus appearing to be on hand for the year ending December 31st, 1901. The true amount of surplus for said year was $557,457.41. The same explanation is made as to the difference. In other words, compla-nant did not deduct the sum of $929,520.00, the amount paid out as interest on the second mortgage bonds. Defendant expressly denies the allegation that the reports show that for the year ending December 31st, 1902, there was a surplus of $1,718,102.00; further defendant says that in truth and fact there was a deficit for said year in the sum of $1,651,155.70. It alleges that complainant failed to deduct from the proper gross incomes, expenditures for betterments and improvements and amount paid out as interest on the second mortgage bonds. If complainant had made these deductions there would have been a deficit in the amount stated. It denies the allegations as to the surplus for the year 1903. Said annual reports, when produced, will show that in truth and fact there was a deficit of $223,177.67. Complainant failed to deduct from the gross income the amounts paid out as interest on the second mortgage bonds. It denies the correctness of the amount stated to be on hand as a surplus for the year ending December 31, 1904. In truth and fact there was a deficit of $75,066.82, as fully appears from said reports.

It denies the statement that for the year ending December 31,
125 1905, there was a surplus of $1,203,042.51. It avers it to be a fact and said annual report shows that in truth and fact there was a deficit of that particular year in the sum of $30,763.74. It denies that there remained the amount of surplus stated for the year ending 1906. It avers that the true surplus for said year was the sum of $330,436.92, as appears, and further that same is so shown by said annual report. For the year ending December 31, 1907, it denies that there was a surplus of $603,813.74, but to the contrary and in truth and fact and as shown by said report there was a deficit of $629,992.51. As to the year 1908 denial is entered that there was a surplus of $265,014.98, but in truth and fact and

as appears from said annual report there was a deficit for that year of the sum of $898,649.02. The surplus for the year 1909 is correctly stated; also for the year 1910. For the year ending December 31st, 1911, it avers that the true surplus as shown by said report is the sum of $188,947.50 and not the amount stated. For the year ending June 30th, 1914, it admits that said reports show a surplus in the possession of this defendant for said fiscal year in the amount stated. As to the allegation that for the year ending June 30th, 1915, there was a surplus remaining in the sum of $252,652.57, defendant says that said allegation is not correct and it denies same. In explanation thereof it says that said report does show that after accounting for all operating income and all operating revenues and deducting therefrom all expenditures for said year there was an income balance shown by said report of the sum alleged. Defendant, however, avers that as against said income balance there is properly chargeable the sum of $997,594.34 on account of profit and losses, which is properly chargeable as against the income for said year. It therefore alleges that for the said year ending June 30th, 1915, there was in truth and fact a deficit in the sum of $745,541.80. It will be observed that complainant has carefully omitted references to the reports for certain years as shown in the allegations contained in Paragraph 22 of this answer hereinbefore made when there was an actual deficit and it refers to the statement therein made for proof thereof. Referring to the further allegations contained in said Paragraph 23 to the effect that on the 1st day of December preceding each 31st day of December or succeeding each 30th
126 day of June, as the case may be and as mentioned in said Paragraph 23, there remained in the possession of the defendant Texas Company a surplus computed by making like deductions as were made in the annual reports for the corresponding year a sum equal to or in excess of the surplus reported as aforesaid for the year ending on the 31st day of December or the 30th day of June of each year as the case may be, defendant says that it does not admit said allegation, but denies same. For reasons hereinbefore stated it is not at the present time able to state what the exact surplus would be, if any, for any particular year so ending, or what deficit there would be for any particular year as mentioned, but it says that it will produce its books or correct statements therefrom showing the amount of surplus, if any, or the amount of deficit, if any. It says, however, upon information and belief that a statement for the annual periods referred to will show that the surplus, if any, will not exceed the surplus shown for the particular years ending December 31st or on the 30th day of June as contained and set forth in said report. Defendant admits that for none of the years ending December 1st was any payment made to any of the holders of income bonds other than the amount named, to-wit: $9,430,290.00. Defendant does not admit that the sum stated, to-wit: $375,000.00 and $929,520.00 paid out as interest on the Second Mortgage Bonds was paid out of the surplus for the particular year ending December 31, 1899, and December 31st, 1900; but as shown by the reports for the respective years this is not true and said allega-

tions are hereby denied. It expressly denies that the interest payments as shown in the reports for the years ending December 31, 1901, to December 31, 1907, were paid out of net income for the particular years on account of the interest for said particular year. This is apparent from said annual reports and from allegations hereinbefore made. It also denies the allegations that the interest payment made on account of the bonds for the interest accruing or claimed to have accrued for the period ending December 31st, 1907, was paid out of the net income for said year. The full and particular facts with reference to same will be hereinafter more specifically set forth. Defendant expressly denies that there did accrue during the annual interest periods of the second mortgage bonds ending
127 December 1st, in the calendar years mentioned, a sum equal to or in excess of $4,177,856.58 over and above the amounts actually paid out as interest on the second mortgage bonds, but in truth and fact expressly avers that no surplus in any manner whatsoever has arisen during my interest-bearing period of said income bonds over and above the amounts actually paid out, and defendant does not admit that the amounts paid out as interest for the respective years represented any surplus of net income for the particular year, but to the contrary denies that same is true.

XXV.

Defendant expressly denies that there exists or has ever existed any surplus sum or sums aggregating the amount named, to-wit: $4,177,856.58, which were and are properly applicable to the payment of interest on said income bonds in accordance with the terms of the second mortgage, as will hereafter more fully appear and be shown according to the terms and stipulations of the said mortgage. No such surplus of same or any part of same, as alleged, has ever existed or now exists, which complainant or any other person is entitled to have applied to the payment of interest on said income bonds. It expressly denies that the board of directors of this company have wrongfully, in violation of the rights of complainant or of the holders of the said income bonds, neglected and refused to determine that said alleged surplus sums were net income applicable to the payment of interest on the income bonds and that they have wrongfully and in violation of the right of complainant and of said holders determined that said surplus sums were not net income so applicable. To the contrary, it would aver that no said sum has ever existed and avers that said board of directors had no power or right to apply any sum or sums whatever to the application of interest on said second mortgage bonds, save and except such as has been actually paid out, and defendant does not admit the full right of the said board of directors to order same. It avers that the said board of directors in declining, failing and refusing, if it has failed and refused to make any additional payments of interest on said second mortgage bonds, acted fully within its powers and to have acted otherwise would have been a gross

breach of the duties and authority conferred upon them.
128 Defendant will here say that, although the holders of said mortgage bonds have from time to time, and at all times, been fully apprised of the actions of the board of directors in determining what sums, if any, should be paid out as interest on said bonds, neither the complainant or its predecessors, nor any holder of said mortgage bonds, has requested or demanded of said board of directors or any other officer of this company any additional payment or payments of interest out of any of the earnings or money of this defendant, and the filing of the bill herein is the first information that complainant or any bondholder or bondholders was setting up any right, claim or demand to have any additional sums paid to them out of any moneys or earnings of this company.

XXVI.

As to the allegations in Paragraph 25 of complainant's bill this defendant admits that it paid out of its income remaining after payment of all operating expenses, interest at the rate of 5 per cent. per annum upon its first mortgage bonds, outstanding under and secured by a first mortgage on its property, said amount of said first mortgage being approximately twenty-five million dollars. It admits that it paid interest at the rate of 6 per cent. per annum upon the bonds outstanding under a mortgage on its eastern division in said first mortgage referred to and interest upon the Texas School Fund Loan at the rate of 6 per cent. per annum. It admits that the allegation in said bill that the aggregate principal amount of its bonds outstanding under its said first mortgage and under its eastern division mortgage together with the School Fund Loan, was substantially for the sum of twenty-five million dollars. It admits the allegation in the complainant's bill that the aggregate principal amount of bonds secured by a mortgage on its eastern division has not since December 1, 1887, exceeded approximately the amount of $3,784,000.00 and that the principal amount of said School Fund Loan has at no time since December 1, 1887, exceeded approximately the amount of $167,000.00. It avers that all of its eastern division bonds were paid and cancelled prior to December 31, 1905. It denies that said School Fund Loan was paid
129 on or before December 31, 1888, but avers that same was finally paid off during the year ending December 31, 1898, as will be fully shown by the records of the company. It admits that no bonds were outstanding between December 1, 1887, and December 31, 1898, issued in accordance with the branch line provision of its first and second mortgage, and it admits that the principal amount of such branch line bonds now outstanding does not exceed the sum of $4,970,000.00. It does not admit that the maximum annual interest charge upon all the issues of bonds described in Paragraph 25 other than income bonds at any time prior to December 31, 1898, exceeded $1,289,510.00, but states that this amount is approximately correct. It does not admit that the maximum annual interest charge on such bonds other than income

bonds have not at any time since December 31, 1898, exceeded $1,538,000.10, but states that this amount is approximately correct, but that the records of the company are the best evidence of these details and same will be relied on and will be furnished and produced at the hearing of this cause. It admits that it has paid a large sum for taxes on the property covered by the second mortgage. This defendant expressly denies, however, that in addition to the sum specified as surplus in Paragraphs 23 and 24 of complainant's bill, the entire income of this defendant remaining after payment of its operating expenses and all interest payable on the bonds other than income bonds in said paragraphs mentioned and of all taxes upon the property subject to the lien of the second mortgage, was or is properly applicable to the payment of interest on the income bonds up to the rate of 5 per cent. per annum or at any other rate. This defendant further admits that with the exception of the interest paid on said income bonds no income remaining has been applied or paid upon same. For reasons which will be hereinafter more fully and completely stated it avers that if any such income remained and has been expended by this defendant, same was expended properly and lawfully and in full accordance with the terms and conditions of said income bonds and said second mortgage securing same and same was not in anywise applicable to the payment of any interest on said income bonds under and by virtue of the terms of said second mortgage securing same. It expressly denies that amounts paid out by it, if any, are correctly set forth in Exhibit B of complainant's bill. It admits that it has paid out from the earnings on its property, interest on the funded debt, interest on the unfunded debt, interest and discount on the current indebtedness, taxes, additions and betterments to property and equipment and for the various other purposes specified in this section, including taxes upon the property subject to the lien of the second mortgage, but it states and avers that it had a lawful right to make said expenditures, and that same were made in strict accordance with the provisions of said income bonds and said second mortgage, and it expressly denies that said expenditures constituted a wrongful diversion and misapplication of any net income of this defendant applicable up to the rate of 5 per cent. per annum to the payment of the interest on said income bonds, and it expressly denies that said payments and expenditures were in violation of any of the rights of the complainant herein or the holders of the income bonds secured by said second mortgage. It expressly denies that the board of directors of this defendant wrongfully and in violation of the rights of the complainant herein or of the holders of any of the income bonds secured by said second mortgage, neglected and refused to determine that said amounts of income alleged to be diverted and misapplied were not incomes applicable to the payment of interest on said income bonds, and it expressly denies that said board of directors wrongfully and in violation of the rights of this complainant or of the holders of any of the income bonds, determined that said income so alleged to be diverted and misapplied was not net income ap-

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plicable to the payment of the interest on the income bonds. This defendant expressly denies that it has diverted or misapplied any income from any source that should have been applied to the payment of the interest on said income bonds secured by said second mortgage under the terms and conditions of said mortgage.

XXVII.

This defendant expressly denies each and every allegation contained in Paragraph 26 of complainant's bill and further expressly denies that there ever existed any surplus sums aggregating $4,177,856.58.

131 XXVIII.

Defendant answering the allegations contained in Paragraph 27 of said bill admits that it did not make payments of interest on the dates specified in said paragraph and in the amounts so specified. It denies that the amounts so specified and claimed were ever payable out of the net income of this defendant as defined and provided in the second mortgage, but to the contrary it expressly avers that no such indebtedness for interest ever existed and it further avers that this defendant never at any time became liable to the complainant or any holder of said income bonds for said sums so named and specified in any part of same. Defendant further expressly denies that there ever existed any surplus sums aggregating or in excess of the amount named, to-wit: $4,177,856.58, and it denies that the reason of its failure and refusal to apply such alleged surplus to the payment of interest on the said income bonds was that default was made by this defendant in the payment on the dates therein specified of interest in the amounts or in excess of the amounts so specified or in any other amount whatsoever, and it expressly denies any allegation therein contained that this defendant at any time or in any manner ever defaulted on account of any interest payment properly due upon said income bonds, and it denies that any default has occurred which would entitle the complainant or any holder of the said second mortgage bonds to recover the amounts of said interest so specified or any part thereof or any interest upon such interest as claimed. It denies that any such default was ever made, and it expressly denies that any such default still continues. As to the allegations contained in said Paragraph 27, reading as follows:

"That by reason of the failure and refusal of the defendant Texas Company to apply to the payment of interest on the Income Bonds, the amounts of its net income applicable thereto and diverted as hereinabove alleged in paragraphs XXV and XXVI hereof, further default was made by the defendant Texas Company on the dates specified above as the due dates of the instalments of interest on the Income Bonds which remain unpaid, in amounts unknown to your orator but which, as your orator is informed and believes,

132 are equal to or in excess of the amounts set forth in Exhibit B hereto annexed and alleged in paragraphs XXV and XXVI

hereof to have been diverted out of the income of the defendant Texas Company during the respective annual interest periods immediately preceding said respective due dates."

Defendant expressly denies each and every fact therein alleged and says that said allegations are not true. This defendant expressly denies that it has ever failed to provide any funds at the dates or at the places where interest was due and payable upon the income bonds in accordance with the terms thereof and of the second mortgage, and it further expressly denies that it has failed to provide elsewhere any funds with which to pay any part of such interest. That it has at all times, where interest was due and payable on said income bonds under the terms of said second mortgage, made provision for the payment of same and same has been fully paid. As to the allegation that on and prior to the due dates of the respective instalments of interest thereon the holders of substantially all of the income bonds were informed that this defendant had not and would not have any such funds at such place or elsewhere for the purpose of paying such interest, defendant says same is true and avers that such information was given for the reason that such interest was not payable under and by virtue of the terms and provisions of the said second mortgage bonds. Defendant denies that the said second mortgage bondholders or any of them were informed that the board of directors of this defendant had neglected and failed to determine that this defendant had received net income available for or applicable to such payments. To the contrary it avers that the complainant and its predecessor, as trustee of the said second mortgage bondholders were informed that the said board of directors of this defendant acting in pursuance of the powers and authority granted to them under the terms of said second mortgage had determined that no net income was available for or applicable to such interest payments. It denies that the facts relative to the existence of such net income were peculiarly within the knowledge of this defendant and its board of directors, but to the contrary it expressly avers that the trustee for said second mortgage bondholders had full
133 knowledge of all of the facts relative to the existence of any net income or non-existence of any income applicable to the payment of the second mortgage interest or by the exercise of proper care and diligence on its part could have had full knowledge pertaining to same. It further expressly avers that all of said second mortgage bondholders and especially the St. Louis, Iron Mountain and Southern Railway Company, who claim to own $23,703,000.00 of the principal amount of said income bonds, had full knowledge of all of the facts in connection with the fiscal affairs of the said Texas and Pacific Railway Company or could by the exercise of reasonable diligence become possessed of said knowledge and information and were fully advised of the action and determination of this defendant through its board of directors that no net income was available or applicable to the payment of interest upon said second mortgage bonds save and except such interest as was paid. These allegations are sustained by the allegations of complainant's bill to the effect that the St. Louis, Iron Mountain and Southern Railway Company

owned about 90 per cent. of said income bonds and that a large amount of the balance was owned by officers, directors and stockholders of this defendant, and the further allegation that a considerable number of the officers and directors of this defendant have at all times prior to March, 1915, been officers and directors of the holder of 90 per cent. of said income bonds, to-wit: the St. Louis, Iron Mountain and Southern Railway Company. Defendant avers further that the defendant has no information as to whether the bonds helds by the St. Louis, Iron Mountain and Southern Railway Company are subject to a pledge, but says if same be true that the party holding said bonds under a pledge had full knowledge of all the facts connected with the fiscal affairs of The Texas and Pacific or with the exercise of reasonable care could have known same. Defendant has no information as to whether all or nearly all of the remainder of the Iron Mountain bonds have for years been owned by the officers, directors and large stockholders of said defendant. It denies on information and belief that the St. Louis, Iron Mountain and Southern Railway Company is insolvent and calls for strict proof of this allegation. It admits that the properties of the St. Louis, Iron Mountain and Southern Railway Company have been placed in the hands of a receiver and that proceedings have
134 been commenced for the foreclosure of its mortgage known as the first and refunding mortgage and that the bonds secured by said mortgage aggregating more than twenty-nine million dollars have been declared due and payable, but on information and belief it states that there was no reason why said bonds should have been declared in default as on information and belief it avers that said St. Louis, Iron Mountain and Southern Railway Company was a solvent corporation. It states, however, that the records of the United States Circuit Court at St. Louis shows that the parties in charge of the St. Louis, Iron Mountain and Southern, to-wit: B. F. Bush, as President, permitted said St. Louis, Iron Mountain and Southern Railway Company to be placed in the hands of a receiver for the non-payment of a debt for supplies aggregating only a few thousand dollars and upon information and belief it charges that said St. Louis, Iron Mountain and Southern Railway Company should not have been placed in the hands of a receiver, that it had property and assets more than sufficient to have met the claim upon which it was placed in the hands of a receiver and all other liabilities that had matured and upon information, and belief it denies that said St. Louis, Iron Mountain and Southern Railway Company is without means to pay either any of its fixed charges or any of its current liabilities. This defendant further avers that it has no knowledge as to whether or not the receiver of the properties of the St. Louis, Iron Mountain and Southern Railway Company, the owner of more than 90 per cent. of the income bonds, has requested the complainant herein to bring this suit, as alleged. This defendant further denies that any sums of interest as specified in Paragraph 27 of complainant's bill are in default or exist, and it expressly denies that any part of said sums as interest or otherwise is in default or that any sum, interest or otherwise, remains due, owing and un-

paid under the terms of said income bonds and said mortgage securing same.

XXIX.

Defendant denies each and every allegation of fact set forth in Paragraph 28 of the bill of complaint and denies that this defendant should account to complainant for the amount of any
135 net income applicable to the payment of interest on income bonds, for the reason that no such net income exists and no diversion has been made as alleged, and it expressly denies that it is entitled by the terms of the said mortgage to exercise any right of entry or to the appointment of a receiver or receivers of the mortgaged premises and of the earnings, revenues, rents, issues and profits thereof.

XXX.

Answering the allegations contained in Paragraph 29 of complainant's bill, defendant admits that it has outstanding approximately $3,400,000.00 principal amount, of promissory notes, which matured on the 1st day of June, 1915, and that the principal of said notes remains unpaid. The holders of said notes, however, accepted and received payment of the interest due upon said notes up to and including the 30th day of November, 1915. It expressly denies, however, that it is without means to pay said notes. This defendant would state, however, that said notes were given in payment of interest that had been declared by its Board of Directors as earned on said Income Bonds. This defendant avers, however, that it has large offsets both legal and equitable as to a considerable portion of the amount represented by said notes, and it avers that upon a complete settlement and accounting between some of the holders of said notes, this defendant will not owe the entire amount of same, but that said amount finally found to be due and payable will be substantially decreased.

Defendant further avers that it now has under consideration the question as to whether or not the indebtedness represented by said notes constitutes a legal and valid obligation as against this defendant, and it reserves the right upon further investigation and advice to test the validity of said notes as an obligation and indebtedness against it.

It further avers that the sum of approximately $820,000.00 of said notes is claimed to be owned by the St. Louis, Iron Mountain and Southern Railway Company, and approximately the same amount is claimed to be owned by the Missouri Pacific Railway.

It further says that the indebtedness represented by said notes, if any indebtedness there was, accrued many years ago, and
136 that the said parties and holders of said notes have from time to time extended the payment of same and have never until a short time before the filing of this suit, made any demand upon this defendant for the payment of same, but has always led this defendant to believe that said notes could and would be extended until such time and times as its finances would enable it to pay off said

notes without detriment to the proper handling and operation of its property, and defendant avers that any and all pressure and urgent demand upon it for the payment of said notes was and is really made to aid complainant herein and especially the St. Louis, Iron Mountain and Southern Railway Company and its representatives in the prosecution of this suit and for the special purpose of harassing this defendant and embarrassing it in the management of its property.

It further avers that the St. Louis, Iron Mountain and Southern Railway Company and the Missouri Pacific Railway Company are closely identified by virtue of stock holdings and is operated as an entire system and by the same officers and receiver, and that the Missouri Pacific Railway Company is a large holder of the shares of this defendant.

Defendant now says that there is pending a suit in the District Court of Texas, Dallas County, styled The Union Trust Company vs. The Texas & Pacific Railway Company, wherein suit is brought to recover judgment upon a part of said $3,400,000.00 notes in the amount, to-wit, of $828,380.00. In this suit said Union Trust Company claims to have derived same from the Missouri Pacific Railway Company, but in truth and fact, defendant avers, the legal title of said notes is in the Missouri Pacific Railway Company and said notes are held by the said Union Trust Company under some kind of a pledge.

It now avers that it, The Texas & Pacific Railway Company, has filed an aswer to said notes, pleading various defenses thereto, as will appear by a certified copy of said answer which will be exhibited on a trial of this cause.

Defendant says that it is advised that there exists merit in the defenses that it has set out to said notes and states that until there is a full trial upon the issues therein made it cannot be definitely
137 determined what amount, if any, is owing by this Defendant upon said notes.

Defendant further says that there is a suit pending in one of the State Courts of New York, by the estate of Jay Gould upon certain portions of said notes, aggregating approximately $1,700,000.00. Defendant says that there is an issue made as to the validity of said notes and as to whether or not this Defendant is liable thereupon, as will fully appear by the pleadings filed in said cause.

It further states that it has been advised by proper representatives of the estate of said Jay Gould, the holder of said notes, that suit was brought thereon, not for the specific purpose of enforcing a collection against this Defendant, but in order to protect the rights of said estate, caused and occasioned solely by the reason of the filing of this suit, and the filing of a suit on the part of the St. Louis, Iron Mountain & Southern Railway Company, or its Receiver, upon certain notes held by said company, which said suit was filed in the United States District Court at Shreveport; and also upon knowledge of a contemplated suit filed by the Union Trust Company in the state District Court at Dallas.

And it further avers that it is advised by representatives of the

said estate of Jay Gould that it is willing to extend the payment of the notes held by said estate, provided the owners and holders of the other notes agree to do likewise.

As to the $820,000.00 of notes claimed to be owned by the St. Louis, Iron Mountain & Southern Railway Company, Defendant says that suit has been filed upon same in the United States District Court at Shreveport, Louisiana, by B. F. Bush, Receiver of the St. Louis, Iron Mountain & Southern Railway Company. Defendant has not yet filed its answer to the merits in said suit, but it avers that it will raise the same defenses as to the validity of said notes as has been raised in the other two suits, and, in addition, it says that it has large offsets to said notes, and in the event it should be liable upon said notes, it charges upon a full and final hearing of said cause, that the amount recovered will be greatly reduced. In other words, Defendant is advised, and so charges, that it has offsets and claims against the St. Louis, Iron Mountain & Southern Railway
138 Company aggregating approximately $600,000.00 which should be allowed as a credit upon said notes in the event any recovery at all is had upon same.

XXXI.

Answering Paragraph 30 of complainant's bill this defendant admits that it is the owner in equal proportions with the St. Louis, Iron Mountain and Southern Railway Company of substantially the entire capital stock of the Trans-Mississippi Terminal Railroad Company, the successor of the Trans-Mississippi Terminal Company, a Louisville corporation formed to construct and own railways and railway terminals in the City of New Orleans, Louisiana.

It admits that the construction of said railway and railway terminals is now in progress, in fact said terminals are practically completed and ready for operation. It admits that said terminals have heretofore been financed by the issue of notes of the Terminal Company, but the amount of notes stated in this paragraph is not correct, the amount of notes outstanding being approximately $4,250,000.00 secured by the pledge of the first mortgage bonds of said Terminal Company in the sum of $6,071,000.00 face amount.

It admits that said notes and bonds have been jointly and severally guaranteed by this company and the St. Louis, Iron Mountain and Southern Railway Company. It admits that the entire issue of such notes have been negotiated, but it denies that the entire authorized issue of such bonds have been sold and pledged, as the entire issue of bonds is $7,500,000.00 and only $6,071,000.00 have been pledged. It admits that the proceeds of the notes sold have been practically expended but expended in the construction of the terminal properties in the City of New Orleans and that said properties are now not only ready for operation but are in part being operated.

It admits that this company has agreed with the St. Louis, Iron Mountain and Southern Railway Company to furnish one-half of all additional moneys which may be required to complete said railway and railway properties and states that said agreement consists in an

agreement entered into between the St. Louis, Iron Mountain
139 and Southern Railway Company, and the Texas and Pacific Railway Company, with the Trans-Mississippi Terminal Railroad Company, by which this defendant and said St. Louis, Iron Mountain and Southern Railway Company become tenants of said Terminal Company in the use of the terminal properties in the City of New Orleans under the terms of the agreement entered into between said parties dated the 15th day of June, 1914, and certain supplements thereto, which contracts will be referred to for a full understanding of their terms and conditions.

It denies that said Trans-Mississippi Terminal Railroad Company would be wholly without the means and wholly unable to procure the means necessary to complete the construction of its railway and railway terminals. On the contrary, this defendant says that said terminals have reached a point of completion in which they are now being operated. This company intends and expects to carry out and perform the terms of the agreement by which it is to use the said terminals and it is advised and believed and so alleges on information and belief, that the St. Louis, Iron Mountain and Southern Railway Company will likewise carry out and perform the terms of said agreement, in which event said Terminal Company will have ample means to carry out all the purposes of its organization and to conduct and operate said terminals efficiently and to the interest of both this defendant and the St. Louis, Iron Mountain and Southern Railway Company.

This defendant denies that the St. Louis, Iron Mountain and Southern Railway Company is wholly and completely insolvent. It denies that the St. Louis, Iron Mountain and Southern Railway Company will be unable to provide or procure to be provided the funds requisite to be furnished by it for the completion of said railway and railway terminals in New Orleans. On the contrary, it states that it is to the best interest of the St. Louis, Iron Mountain and Southern Railway Company to carry out all the terms and conditions of said operating agreement and the Court appointing the receiver of the St. Louis, Iron Mountain and Southern Railway Company, to-wit: B. F. Bush, if correctly advised of all the facts in the exercise of a sound discretion and judgment and for the proper protection of the rights of the said St. Louis, Iron Mountain
140 and Southern Railway Company will require the receiver of said company to carry out and perform, ratify and approve all of the conditions of said operating agreement.

This defendant admits that said railway terminals at New Orleans are very essential to the interest of both the St. Louis, Iron Mountain and Southern Railway Company and The Texas and Pacific Railway Company. That this defendant would have no terminal or terminal facilities should it not have the use of the terminals provided by the Trans-Mississippi Terminal Company. It admits that the port of New Orleans is very essential to the operation of the lines of this defendant and of the Iron Mountain Company.

It further states that this company is willing, ready and able to carry out all of the terms and conditions of the agreements made

with the Terminal Company for the use of said terminals at New Orleans. That said Terminal Company is a solvent concern with sufficient property to secure the payment of all of its obligations.

That this defendant is able, willing and ready to carry out all of its guarantees upon the notes and bonds of said Terminal Company, and it denies that it is unable to provide or procure to be provided funds necessary for the purpose of carrying out its guarantee on said bonds or notes or for carrying out its obligations under its operating contract with said Terminal Company, and it denies that said Terminal Company is without the necessary funds for the completion of its said railway and railway terminals, and it denies that this defendant is and will be wholly unable to provide funds for the completion of said terminals as alleged, and this defendant avers that it is the duty of the said B. F. Bush as receiver of said St. Louis, Iron Mountain and Southern Railway Company (which company is shown to be the owner of approximately 94 per cent. of the second mortgage bonds sued on in this cause and is the real complainant in this cause) to promptly advise the Court appointing him as such receiver, of the true facts concerning said Terminal Company and its relation with said Iron Mountain Company and to make prompt application to the Court for full authority to ratify, approve and carry out any and all of the obligations made and entered into be-
141 tween said Terminal Company and the said St. Louis, Iron Mountain and Southern Railway Company.

This defendant states that prior to the institution of this suit it had ample credit to raise such funds as it might need to advance the said Terminal Company to carry out the scheme of the Terminal Company in the matter of constructing and operating its terminals in the City of New Orleans. That the effects of this suit was to libel the credit of this company and *while* to some extent has impaired its credit to raise such funds and this defendant alleges that it is to the interest of both this company and the St. Louis, Iron Mountain and Southern Railway Company to make full use of said terminals and to carry out all of the contracts and agreements under which they obtained the right to use same. And defendant avers it is and will be financially able to do so.

That the port of New Orleans is necessary and essential to the business of both this company and the St. Louis, Iron Mountain and Southern Railway Company and without the use of said terminals said companies would practically be without the necessary terminals with which to conduct and prosecute their business into and through the port of New Orleans.

XXXII.

This defendant, answering the allegations contained in Paragraph 31 of complainant's bill, says: It expressly denies that it has outstanding any floating indebtedness in a substantial amount for material and supplies furnished to date for operating expenses, much of which complainant alleges is now overdue. It expressly denies that this company is unable to pay same. On the contrary, this defendant states that its current outstanding bills are by far the smallest amount

outstanding in its history, while its current earnings are in excess of any other period.

That all current bills are and will be paid promptly at maturity and this defendant is supplied with necessary means to meet said bills as they mature and are presented for payment and this without the necessity of effecting loans for the purpose of meeting such obligations.

142 This defendant denies that it is without means adequate and available to meet its immediate pressing needs in operating its system. It expressly denies that there was any grave danger that some of the creditors holding said floating indebtedness for supplies might bring suits in respect thereof and might levy execution on the lines of railway owned by this company and on equipment, material, supplies and other property of this company. On the contrary, this defendant says it has ample means to meet all of its current bills, was meeting and is now meeting same. That but for the institution of this suit, which this defendant alleges is a libel upon its credit, its credit was unquestioned and it had no difficulty and has no difficulty now in obtaining all supplies necessary for its operation and maintenance.

This defendant expressly denies that any suits will be brought against it by its outstanding general creditors for material and supplies and says no judgment will be obtained against it and no executions levied upon its property. That there is no necessity for this Court or any Court to take possession and impound the property of this defendant for the purpose of preserving it against the attack of the general creditors. That any such attack will be made and that there is the possibility of any such attack, only exists in the imagination of the real complainants in this bill, to-wit: the St. Louis, Iron Mountain and Southern Railway Company and its receiver.

XXXIII.

Answering Paragraph 32 of complainant's bill, this defendant says it denies that its incomes and revenues are or will be insufficient to pay off and discharge the indebtedness now due and owing by it. It denies that it has no resources with which to provide for the payment of such indebtedness, and it expressly denies the allegation in this paragraph of complainant's bill that it is insolvent. On the contrary, it states that it is a going business concern with a well established commercial credit and in a physical condition at this time to perform its duties to the public and obtain all the necessary means to that end.

143 ## XXXIV.

Answering Paragraph 33 of complainant's bill, this defendant admits that the railroads, properties, premises and franchises covered by the second mortgage, Exhibit A, to the bill herein constitutes one single property and is an instrument and highway of commerce in several states and that same should be conducted as a single enterprise.

It further admits that if same should be sold, that it should be sold as a whole. It denies, however, that the complainant in this

cause of action has any right to have same sold at all or that this complainant or any of the income bondholders has any right of foreclosure under the said second mortgage at this time and under the allegations contained in its bill.

XXXV.

Answering Paragraph 34 of complainant's bill, this defendant says it expressly denies each and every allegation therein contained except that it admits that no proceeding has been commenced in law or equity for the collection or enforcing of said mortgage debt other than this suit, and this defendant alleges that this suit is without merit and should not have been instituted.

XXXVI.

This defendant expressly denies each and every allegation of Paragraph 35 of complainant's bill and it expressly denies that the complainant is entitled to the relief therein prayed for or any part thereof.

XXXVII.

This defendant, answering Paragraph 36 of complainant's bill, says: It denies that this is a civil suit in equity or a controversy that arises under the Constitution and Laws of the United States, and it avers that complainant has no legal or equitable lien upon any of defendant's property which it is entitled to enforce in this or any other Court.

144 XXXVIII.

Defendant denies that complainant is entitled to the relief or any part thereof as prayed for in its bill.

XXXIX.

And now comes defendant, The Texas and Pacific Railway Company and for further answer in its behalf says: That under and by virtue of the terms and provisions of the said second mortgage referred to and made Exhibit — in Paragraph 20 of complainant's bill, among other provisions and obligations, it was provided that this defendant, The Texas and Pacific Railway Company, should pay off and discharge and cause to be paid off and discharged all taxes, assessments and all other liability and governmental charges which from time to time might be lawfully levied or imposed by competent authority upon the said railway property and premises or any part thereof, the lien whereof might or could be held to be superior to the lien of the second mortgage bonds and also all interest charges which from time to time might become due and payable upon any bonds having a prior lien to the bonds secured by the said second mortgage, so that the security of said second mortgage bonds should at all times be fully maintained and preserved, and it was further provided and by virtue of Section II of Article III of said second mortgage, it

obligated itself at all times to maintain in full quantity the number and efficiency of its rolling stock, tools, machinery, buildings, bridges and other structures and by virtue of Section III of said Article II this defendant obligated itself to preserve all of the rights and franchises to it granted and upon it conferred by the Acts of Congress appertaining to its railway property and premises subject to the lien of said second mortgage and that it should at all times maintain, preserve and keep said property and every part thereof with its rolling stock, fixtures, appurtenances and every part and parcel thereof in thorough repair and working order at least equal to its then present condition in respect to the roadbed, ties, rails, motive power, rolling stock and equipment, and likewise the said The Texas and Pacific Railway Company was obligated to keep said property fully

145 supplied with suitable and sufficient motive power, rolling stock and equipment and was obligated from time to time to make all needful and proper repairs, renewals, replacements, useful operations, conditions, betterments and improvements so as to maintain the same in proper order and keep in complete repair and good working condition so that the traffic and business of said road and every part thereof should at all times be done with safety and expedition.

It says that by virtue of Article 5 of said second mortgage it became obligated to pay the principal of same at the maturity thereof and to "pay interest on said principal sum (meaning principal sum of said mortgage bonds) up to the rate of 5 per cent. per annum from December 1, 1887, payable annually on the 1st day of March in each year, the first payment, if any, to be due March 1, 1889, in like gold coin out of the net income of the railway company as the same may be determined by the Board of Directors of the railway company."

It was further provided by said Article 5 that if the income of the railway company applicable for the interest on said bonds should not in the judgment of the Board of Directors be sufficient to pay the said interest in full, such interest or so much as should remain unpaid should not accumulate.

Defendant now avers that all of the second mortgage bonds now outstanding were issued subject to the terms and provisions herein recited and subject to the terms and provisions of all the said second mortgage.

Defendant alleges that it was its duty to comply with the terms and provisions of said mortgage, and that neither the complainant nor the holder of any of the said second mortgage bonds were entitled to receive any interest upon said bonds during any interest-bearing period until all of the terms, stipulations and conditions of the said second mortgage bonds had been fully complied with. It avers that it has from time to time and at all times made only such expenditures and investments of the funds coming into its hands upon the railway lines and property covered by said second mortgage as it had the power and right to make by virtue of the terms of same.

That it has at all times faithfully, as far as its income and

146 funds would permit, kept and performed all of its obligations with respect to the provisions of said second mortgage. It

now expressly avers that neither the complainant nor the holder of any of said mortgage bonds was entitled to receive or demand any interest accumulating during any interest-bearing period except such net income as might arise after having discharged all of its obligations with reference to preserving and maintaining said property, and it further avers that even though at the end of any interest-bearing period or of any calendar or fiscal year there should remain any surplus for said particular period that said sum was not and could not be available for the payment of interest except as same might be determined by the Board of Directors of this defendant, and further that the said Board of Directors not only had the power but it was its duty to see that a sufficient and proper amount of surplus should be preserved and kept in the treasury of the company at all times to protect the property covered by said mortgage bonds and to carry out and fulfill the obligations of this defendant.

Defendant further avers that no fund or net income at any time ever became available or applicable to the payment of interest on the said second mortgage bonds except such as might remain after the performance and discharge of all of the obligations contracted for in said second mortgage and such as should be available after the said Board of Directors had determined what amount of surplus, if any, remaining, should be reserved to take care in the future of any deficits which might occur in the management and operation of the property, and take care of all contingent liabilities which might thereafter arise and which would affect the property, and also take care of any shortages or other deficiencies which might fail to be collected in items treated as income.

As part illustration Defendant would say that at all times there existed and was pending against this Defendant large amounts of judgments which had been obtained in various courts and were then pending in appellate courts, a large amount of which this Defendant was liable to be called on to make payment from time to time, and it was therefore necessary to anticipate such unusual payments and provide proper funds for same. These liabilities grew out of
147 the operation of the road and were, therefore, chargeable as against any net income.

And as a further illustration Defendant says that in the operation of an extensive property such as The Texas & Pacific Railway unusual and unforeseen accidents were liable to occur in which Defendant might be held liable, and it might require a considerable sum of money on any occasion to make proper settlements with reference thereto.

Defendant further avers that by virtue of the covenants and obligations made and entered into in said second mortgage, the said Board of Directors had a broad discretion with reference to the right and power to determine what sum or sums, if any, was available for the payment of the interest to any extent upon said second mortgage bonds during any interest-bearing period, and it expressly avers that the said Board of Directors have well and faithfully kept and performed *its* duties, and the confidence and power reposed in and granted to them, and it here and now avers and pleads that all in-

come properly available for and applicable to the payment of interest on said second mortgage bonds has by due action on the part of said Board of Directors been ordered to be paid and has been paid to each and every holder of said second mortgage bonds, and that no sum or sums of money on account of interest arising upon said second mortgage bonds is now due and payable or has ever been due and payable save and except such as was declared to be so due and payable by virtue of the action of its Board of Directors.

Defendant further and expressly avers that even though any surplus may have been left over at the end of each interest-bearing period or at the end of any calendar or fiscal year that same did not necessarily become applicable to and available for the payment of interest on said second mortgage bonds, but same rested within the discretion of the Board of Directors and it avers that the action of said Board with respect thereto was and is final and conclusive.

Defendant avers that as a matter of law and which was well known to the purchasers and holders of said mortgage bonds and which entered into and became a part of the obligations of said second mortgage and the income bonds issued thereunder, it was
148 the duty of this defendant to keep it properly in good condition and to make all proper and needful expenses thereunder, so as to enable it to perform its public duties with safety and expedition and to properly maintain and carry on its business as a common carrier. To do this it was absolutely necessary to see that all the proper expenditures should be made, not only in strict accordance with the obligations entered into by virtue of the terms and provisions of said second mortgage, but to do and perform each and every other act and to make all needful and proper expenditures which would protect the property and enable it to perform and discharge its public duties.

It further avers that this defendant has at all times, as far as its means were available, kept and performed all of its contractual obligations as well as those imposed upon it by law; that had it failed in the performance of any of said duties, the security of the said income bonds would have become greatly impaired, if not absolutely destroyed, and it says that each and every item of expenditure made has been for the benefit of said second mortgage bonds and preserved the lien held by same.

Defendant expressly denies the allegation contained in Paragraph 25 of complainant's bill that except as to the amounts payable for interest on the bonds other than the income bonds mentioned in this suit and for taxes upon property subject to the lien of the second mortgage bonds, all other expenditures constituted a wrongful diversion and misapplication of the net income of this defendant applicable to the payment of the interest on said income bonds and was in violation of the rights of the holders of said income bonds.

Defendant expressly avers that it had the right to make expenditures on account of interest charges on debts either funded or unfunded on account of interest and discount on current indebtedness, taxes, additions and betterments, property and equipment, property and new equipment and in the liquidation of debts and obligations

incurred prior to the execution of the said second mortgage, and it further expressly provides that each and every payment and expenditure which it has made on account of any item or for any purpose since the execution of said second mortgage bonds or since
149 the date that interest thereon became payable, has been a lawful expenditure and that it has never made or caused to be made any wrongful diversion or misapplication of any net income applicable to the payment of the interest on said income bonds.

XL.

And for further answer defendant says that if it at any time paid out any sums of money as interest on the funded or unfunded debts or interest and discount on current indebtedness, that said debt and debts arose on account of the operation of the road and that it had a right to take care of same out of the revenues derived from the operation of the road or otherwise.

It is not claimed that this defendant had any other sources of revenue with which to take care of the matters complained of except from its current earning, and it is clear that it was right and proper to make payments of all of the items complained of before any net income could exist which would be applicable to the payment of the interest on said income bonds. The same is true with reference to taxes, additions and betterments as well as equipment and new property and new equipment.

XLI.

Further answering, this defendant says that if it should be held by the Court, which is denied by this defendant, that it, the defendant, was not entitled to make payment out of the current earnings on account of any indebtedness arising prior to the execution of said income bonds, or when interest began to accrue upon same according to the terms of said bonds; it says that not all of the income shown by the reports of the Board of Directors as set out in complainant's bill and in the defendant's answer, arose on account of the income received since said bonds may have commenced to bear interest, but in truth and fact, prior to December 1, 1887, the said railway company or its representatives and persons from whom it received said property had earned large sums of money then due and outstanding and that it collected large and various sums of money after December 1,
150 1887, and after December 1, 1888, and succeeding years thereafter, which was not earned during said periods but had been earned prior thereto, and if an accounting is had and this defendant is chargeable with the payments made on account of any indebtedness existing prior to the time said bonds began to bear interest, then it says it should be credited with all sums which were earned prior to December 1, 1887, and prior to December 1, 1888, and that same should be excepted and taken from all accounts chargeable against this defendant on account of current earnings and net income as applicable to interest payments on said second mortgage bonds.

XLII.

For further answer and pleading herein defendant says that except as to the amount of income of the road as was declared available and applicable to the payment of interest on said income bonds and which was actually paid, the said Board of Directors of this defendant regularly and at stated periods duly considered the question as to whether or not any net income was available for and applicable to the payment of interest on said income bonds and did in the exercise of the power and authority conferred upon it, regularly and annually from time to time, declare that no net income was earned or was available for and applicable to the payment of interest on said second mortgage bonds.

It avers that this complainant and its predecessor, as well as each and every holder of said income bond or bonds, knew of the action and determination of said Board of Directors, and knew of the fact that no order or declaration had been made by said Board of Directors directing the payment of any sum or sums toward interest on said second mortgage bonds, or by proper diligence could have known of same, and each and all of them acquiesced therein and failed at any and all times to make any complaint with reference to the action of said Board of Directors or with reference to the failure of the said Board of Directors to determine that any net income was available or applicable to the payment of the interest on said income bonds, and have in truth and fact acquiesced in the action of the Board of Directors and in the construction given to the terms
151 and provisions of said second mortgage by said Board of Directors for the period from time to time and at all times since the first day of March, 1889, and up to the filing of this bill.

Defendant says that the complainant and its predecessor as well as the holder and holders of said second mortgage bonds have acquiesced in the action of the Board of Directors both by expressed acts and by inferences and failure to make any complaint or complaints with reference thereto, or in failing to repudiate in any way the action of said Board of Directors, and in failing to make any demand upon said Board for the payment of any interest out of any remaining surplus or otherwise.

Defendants says that if at any time or times there existed any net income available and applicable to the payment of interest on said income bonds save and except such as was paid, that the holder and holders of said mortgage bonds and their representatives have made no claim thereto, but have permitted this defendant from time to time to use all of such sum and sums, if any there be, in making additions, betterments and various other expenditures, towards the improvement and upkeep of said road, the effect of which maintained and increased the security of said income bonds, and it says that the holders of said second mortgage bonds and each and all of them have been guilty of laches in not asserting any rights which they may have as set forth in said bill and that a Court of equity cannot and will not entertain the plea in their behalf presented; as will be seen if the complainant for and on behalf of the said income

bonds should now be permitted to have an account stated and charge this defendant with the surplus or any part thereof which is claimed to have existed from year to year as applicable to the payment of interest, it would amount to large sums of money and would be greatly to the prejudice of this defendant and its property and would create a burden on its stockholders, the first mortgage bonds and would seriously affect the rights of all other persons interested, as well as the public generally. And on account of such delay and laches on the part of said bondholders and their representatives the relief sought should be denied.

In addition thereto it says that as appears from complain-
152 ant's bill all of said alleged surplus has been expended by this defendant either in properly maintaining the operation of said road or in additions and betterments, repairs and renewals, which enhance the security of the said income bonds, and it therefore says and pleads that no Court of Law or Equity will in good conscience permit complainant or any income bondholder at this late date and under the facts as herein alleged, to have an accounting or a decree fixing any debts or liability against this defendant by reason of the expenditures as actually made or on account of any failure on the part of this defendant, to apply any surplus to the payment of the interest on said income bonds except such as has been actually paid.

It therefore pleads and relies upon the laches of complainant and the holders of said second mortgage bonds and the acquiescence of said parties in the acts of the Board of Directors as a bar to any of the relief or any part thereof prayed for by this complainant.

XLIII.

And for further answer and plea in its behalf this defendant says that by reason of the acquiescence of complainant and its predecessor and the holder and holders of the said income bonds, in the action of the Board of Directors with reference to its determination and the exercise of its discretion concerning the payment or non-payment of interest upon said income bonds and by reason of the failure of said parties and each of them to make any complaint or demand upon said Board of Directors to have determined certain net income as applicable to the payment of interest on said income bonds as complained of and by reason of said parties and each of them in permitting and allowing the said Board of Directors and officers of this defendant without complaint or dissent to use all surplus arising from time to time in expenditures on account of the operation of said road and in additions and betterments and other matters hereinbefore set forth, defendant says that complainant and each and all other parties represented by it is estopped both in law and equity in now seeking to overturn the action of the Board
of Directors and in obtaining a decree from this Court for
153 the relief or any part thereof prayed for, and it pleads and relies upon same as a complete defense to this suit.

XLIV.

And for further plea and answer in its behalf, defendant says that if at any time or times complainant or the holder or holders of any of said income bonds ever had any right or cause or causes of action on account of the interest due on said income bonds that said cause and causes of action accrued more than two years prior to the institution of this suit and it, therefore, pleads and relies upon the Statute of Limitations of two years as a complete bar to any right of recovery in this cause.

XVL.

And for further plea and answer in its behalf, defendant says that if at any time or times complainant or the holder or holders of any of said income bonds ever had any right or cause or causes of action on account of the interest due on said income bonds that said cause and causes of action accrued more than four years prior to the institution of this suit and it, therefore, pleads and relies upon the Statute of Limitations of four years as a complete bar to any right of recovery herein.

XLVI.

And for further answer and plea in its behalf, defendant says that all cause and causes of action set forth in complainant's bill, if any there be, arose more than two years prior to the filing of this suit and defendant, therefore, pleads and relies upon the Statute of Limitations as a bar to any right of recovery herein.

XLVII.

And for further answer and plea in its behalf, defendant says that all cause and causes of action set forth in complainant's bill, if any there be, arose more than four years prior to the filing
154 of this suit and defendant, therefore, pleads and relies upon the Statute of Limitations as a bar to any right of recovery herein.

XLVIII.

For further answer and plea herein defendant says that by virtue of Article 5 of the said second mortgage, it was expressly provided among other things: "there shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured thereby except in the event of a foreclosure of the first mortgage bonds."

Defendant avers there has been no foreclosure of the first mortgage and said first mortgage is nowise in default on account of failure to make any payment of interest or any payment of principal or otherwise, and said provision is a substantial element of credit of this company as to its general creditors and all other person or persons dealing with it, and was expressly intended to prohibit and prevent the very action that complainant is now seeking to do, and it pleads and relies upon the contract agreement and provisions

herein referred to as a bar to the relief prayed for by said complainant, and if defendant is mistaken as to this, then it says and pleads that complainant's cause of action, if any it has, is purely one of law and authority and different from that involved in this suit.

XLIX.

For further answer and plea in its behalf, this defendant says that under and by virtue of the second mortgage it was expressly provided that the said second mortgage should not mature until the year 2000 which it is alleged was the date of maturity of the first mortgage.

It says that said provision was a substantial and material one and is binding upon the complainant and that this Court is without power to grant any decree against this defendant for the amount of the said second mortgage or make any order of sale in connection with such decree, and that the said complainant and all holder and holders of said mortgage bonds are not entitled
155 on any account or for any reason to have a foreclosure sale of the property of this defendant upon the indebtedness or any part thereof represented by the said income bonds.

L.

For further answer defendant says that as an evidence of the good faith and sound judgment and the proper action of its Board of Directors in not applying any of the income other than it did to the payment of interest on income bonds, defendant would show the Court that for the period of years beginning with the six month-ending December 31st, 1888, and ending November 30th, 1915, the income and profit and loss balance sheet of this defendant shows that there was a deficit in the operation of its property of $134,962.40. That where an apparent surplus is shown for any particular year, actual deficits are shown for the next or following year or years and where an actual surplus is shown in any particular year, in every instance same was more than anticipated in the way of needed improvements, repairs and additions, which could justly and rightfully be made under the terms of said second mortgage, and whatever apparent surplus did appear, when, in the judgment of the Board of Directors same was not applicable to the payment of interest, said surplus was properly paid out for the purpose of improvements, betterments, renewals, repairs, taxes and operating expenses generally, all going either to the preservation of the property or to its improvement and to the end that it might be operated more efficiently and economically, all of which inures to the benefit of the income bondholders.

Defendant alleges it was the peremptory duty of the directors of this company to keep its property in safe operating condition and to furnish the best service commensurate with its revenues to the public, that is, both by virtue of the obligations of the second mortgage and by virtue of the laws of the different states in which the line of railway was located and operated; that in the exercise

of their best judgment, acting in the utmost good faith, the said Board of Directors of this company have undertaken to carry out this public duty.

156 Defendant alleges that in the payment of interest that was actually paid upon said income bonds, said Board of Directors acted more favorably and liberally towards said income bond holders than they deserved under the actual existing conditions, and as a matter of fact there has been no time in the history of this property since the execution of said income bonds when the property did not actually need every cent of its surplus revenue that it might have from earnings to improve its equipment, its roadbed, its power and its conditions generally.

Defendant states that the said B. F. Bush, receiver of the St. Louis, Iron Mountain and Southern Railway Company, in April, 1911, became the president of the Missouri Pacific Railway Company and of the said St. Louis, Iron Mountain and Southern Railway Company. That he had full knowledge of the existing conditions surrounding the operation of this defendant and had full knowledge of the fact that the Board of Directors had determined and declared no revenue was applicable to the payment of interest upon said income bonds, and at no time from said date down to the filing of this suit did the said Bush, for himself or on account of the properties represented by him, make any demand for an accounting under the said second mortgage or for any possession under same or for the institution of any suit thereon or questioned in any way the good faith or action of the Board of Directors concerning interest upon said income bonds.

Defendant avers, upon information and belief, that the Missouri Pacific Railway substantially owns the stock of the Iron Mountain Railway or dominates and controls same and that said companies are operated as one system subject to the same management and control, and defendant here expressly avers that any request made by said Bush as receiver of the St. Louis, Iron Mountain and Southern Railway Company or in any other capacity with reference to the bringing of this suit and the attack made upon the good faith of the Board of Directors of this defendant and the bringing of this suit was had and made for the purpose of securing the control of this defendant's property for the benefit and use of the Missouri Pacific Railway Company and of the St. Louis, Iron Mountain and Southern Railway Company.

157 Defendant charges that such control of this company either by the Missouri Pacific Railway Company or the Iron Mountain Company or by both jointly would be in contravention of public policy and unlawful and in violation of existing laws.

L-A. In explanation of the printed reports of the Board of Directors of this Defendant, referred to in Complainant's bill and in this answer, and of the surplus shown to exist from year to year, as therein shown, and as well as to the surplus shown by reports hereinafter to be filed, and which is sometimes referred to in Complainant's bill and this answer as "income" or "net income," Defendant says: that in arriving at said surplus "income" or "net income" are

sums and items earned or accruing during the particular period referred to and are treated as income when, in fact and truth, large amounts of same at the end of the particular stated period had not been actually collected and received, but was represented by amounts earned during the particular period, and due from other connecting lines, and in various other ways. Said surplus or "income" or "net income" did not, therefore, represent actual cash on hand at the end of the particular period, but rather represented the amount actually received as well as the amount and amounts earned by and due the company for the particular period, and which had not then been collected, and many items of which it was anticipated would not be collected for a considerable length of time thereafter, and various items have never been collected and received.

Defendant further states, as will appear upon the hearing of this cause, that various items were charged in as income which did not arise or grow out of the operation of the road, and it says that if an accounting is to be had and stated between the parties hereto that said sums treated as "income" and which did not grow out of the operation of the road should not be chargeable against this Defendant.

All of the allegations of this Defendant with reference to "surplus," "income" and "net income" is to be taken and considered in connection with these allegations.

L.-B. Defendant says, as hereinbefore alleged, and which
158 is now reiterated, the holders of said income bonds during certain years received and collected a large amount of interest which was not available or applicable out of any "income," "net income" or "surplus" for that certain interest-bearing period, and same should not have been so paid to them, and it avers that if there is or should be any accounting had or taken in this cause that all sums and amounts so paid and received by said bondholders in excess of the amount available and applicable under the terms of the mortgage for the particular interest-bearing period, should be charged to said bondholders.

L.-C. Defendant denies the allegation of fact contained in the amended bill of complaint, as contained in said part of the amendment made in paragraph 27 thereof.

L.-D. Defendant says that the provisions of the income bonds and the Second Mortgage speak for themselves.

Defendant expressly denies that it failed to perform any duty charged upon and expressly entrusted to it and that it diverted portions of its net income for purposes other than the payment of interest on the income bonds, save and except such as it, through its Board of Directors, had the right to do. It says that its said Board of Directors acted fully within its power and discharged its duties faithfully with respect thereto.

And it further says that if the said Board of Directors in any way failed to perform its duty and did divert portions of net income for purposes other than the payment of interest on the income bonds, that the Trustee and bondholders acquiesced in same and received the full benefits therefrom.

In explanation of the printed reports of the Board of Directors of this Defendant, referred to in Complainant's bill, and in this answer, and of the surplus shown to exist from year to year, as therein shown, and as well as the surplus shown by reports hereinafter to be filed, this Defendant says: the said printed reports of the Board of Directors referred to in Complainant's bill and in this answer do not show all of the expenditures made from time to time by this Defendant. In truth and fact Defendant avers that in various and sundry years large sums of money were expended by this Defendant for improvements, betterments, equipments, and various and
159 sundry other items and accounts, and for which expenditures this Defendant was entitled to deduct and has deducted from its gross income before any Second Mortgage bondholder should be paid anything on account of interest on said bonds. A full and complete statement of said items will be furnished at the hearing of this cause.

As stated, said items were not taken into account in the printed reports in connection with the statement of gross income, net income, expenditures, etc. Defendant, therefore, says that upon a complete statement, the amount of net surplus on hand for any particular year will be much less than the surplus stated in the printed reports, and, for some years the deficit will be greater than that shown in the printed reports.

It further avers that the failure to deduct from the gross income the expenditures made as herein stated in no way operated to the detriment of the holders of the income bonds, but, to the contrary, they reaped a benefit thereby; and Defendant says that if any account is had and stated between the parties it is entitled to be credited with all expenditures made by it during each particular interest-bearing period rather than the expenditures shown by the printed reports.

Defendant says that the allegations made in this paragraph are to be taken and read with its allegations and admissions in this answer concerning income, net income and surplus, and it is not to be understood as admitting that the surplus, income or net income as shown by the printed reports is correct, but in truth and fact other additional amounts as herein alleged should be deducted.

LI.

In addition to the facts as hereinbefore set forth and in conclusion this defendant says:

It is not indebted to said Income Bondholders under said Second Mortgage in any sum as interest.

That the principal of said indebtedness as represented by said Second Mortgage Bonds does not mature until the year 2000.

160 That this defendant has not been in default according to the terms of said Second Mortgage in such a manner as would mature the principal of said Second Mortgage Bonds.

That this defendant has not defaulted in the payment of interest on its First Mortgage, and that said First Mortgage has not been

foreclosed, and the complainant herein is not entitled to a foreclosure of said First Mortgage securing said Income Bonds.

That the possession of the property by this defendant is just and lawful and should not be disturbed.

That the affairs of this defendant are being administered honestly, fairly and economically.

That both public policy and the law requires that said property should be administered by the officers and Board of Directors of this defendant, other than a committee appointed by the Trustee under the Second Mortgage or by the bondholders secured by said Second Mortgage.

That complainant has shown no equity, and has sho[illegible] no condition that would justify this Court in taking any action, especially in the matter of appointing a receiver.

That none of complainant's rights are jeopardized under existing conditions, nor will they be in anywise jeopardized by the possession and operation of said property by the Board of Directors and officers of said company.

That the assistance and ajd of this Court in being asked to appoint a receiver and take possession of this property is not made in good faith, and is not required or demanded under existing conditions.

And this defendant denies that it is insolvent.

For these and other good reasons, this defendant, having fully answered, prays to be dismissed with its cost in this behalf expended.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
Solicitors for Defendant The Texas and Pacific Railway Company.

CHADBOURNE & SHORES,
Of Counsel.

161 *Order of Dismissal,*

Filed February 23, 1916.

Order of Dismissal.

WEDNESDAY, February 23, 1916.

Heretofore, on February 16, 1916, came on to be heard the motion of the defendant New Orelans Pacific Railway Company to dismiss as to it the above styled suit. And said motion and the argument of counsel thereon having been heard, the same was denied.

Thereafter, on the same day, came on to be heard the Motion of the defendant The Texas & Pacific Railway Company to dismiss the bill of complaint in said suit for want of jurisdiction in the court to hear and determine the cause. And upon said day and the succeeding days said motion and the argument of counsel thereon were heard.

And it now appearing to the court that this court is without

jurisdiction to hear and determine the cause, it is considered by the court, and it is so ordered and decreed, that said motion of the defendant, The Texas & Pacific Railway Company is granted, and that the amended bill of complaint in said suit filed February 8, 1916, in substitution for the original bill of complaint therein, is dismissed as to both defendants solely upon the ground that this court is without jurisdiction to entertain the same. And it is ordered that all costs be taxed against the plaintiff.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

162 *Memorandum Opinion of District Judge.*

Filed February 28, 1916.

Memorandum Opinion of the Court on Defendant's Motion to Dismiss.

The arguments of counsel for and against the motion of the defendant The Texas & Pacific Railway Company to dismiss this cause on the ground that the court is without jurisdiction to hear and determine the issues raised by the bill of complaint, have taken a wide range. This, because of the importance of the questions involved and the inclination of counsel to argue these questions in all their bearings; also because of the desire on the part of the court to have these questions argued and threshed out as thoroughly as possible. This has been my desire and I have wished to throw the burden upon counsel, because of my temporary physical disability, which has prevented a reading and examination of the authorities urged upon my attention by counsel for and against the motion to dismiss. While I have consulted some of the authorities submitted, I have not been able to do this to any great extent. I have therefore invited counsel to read from the decisions at length.

As the arguments have progressed I have, with the increasing light, been able to reach my conclusion. I have not been able to formulate in writing the reasons leading me to the conclusions reached, so they may not be given with the perspicuity and care that I would like, and to which counsel by their able and exhaustive arguments have shown themselves entitled. However, I feel I have reached my conclusion advisedly.

As I view it, the Supreme Court in Osborne v. The Bank, 9 Wheat, 737, did not, in sustaining the jurisdiction of the cause because of the presence there of a federal question, distinguish between
163 the mere creation of a corporation by an act of Congress and the functions, powers and privileges created and reposed in such corporation. Chief Justice Marshall in that case seems to make this very clear. He says: "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses.

The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no rights, make no contracts, bring no suit, which is not authorized by a law of the United States. It is not only itself a mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being thus constituted have a case which does not arise literally, as well as substantially, under the law?"

When the congress by its enactment incorporated the United States Bank, its being as created was invested with and there inhered in it all the powers, functions and privileges given it by law. The Century Dictionary defines "Incorporate" as follows: "To confer corporate rights, as to incorporate a railway." Thus the creating of and the reposing in this entity these powers and functions, in my opinion, constituted in a proper and complete sense the act of incorporation. So it is with the Texas and Pacific Railway Company. When the congress by its enactment incorporated the Texas and Pacific Railway Company the result of the act of incorporation was to bring into being this entity clothed and endowed with certain functions, powers and privileges, as formulated and set forth in its charter.

I do not believve jurisdiction of a case has been held to exist in a court of the United States solely and alone by reason of the fact that one of the parties was a corporation created by enactment of congress without at the same time having in contemplation
164 the functions, powers and privileges granted by its charter and therefore inhering in and being a very part of the body incorporated. When thus considered of necessity there is given rise, at least potentially, to a federal question or federal questions, when it sues or is sued in a court of the country. Some of the decisions read by Mr. Locke simply refer to the fact that a corporation has a federal charter as the basis or ground for entertaining jurisdiction over the controversy before a federal court. I am of opinion that the courts in making such reference had in mind and intended to include as an implied though not stated ground the act of incorporation by congress lying behind such charter and also harked back to the reasoning of the Supreme Court in Osborne v. Bank and the Pacific Removal cases. From this latter case I quote as follows:

"If the case of Osborne v. The Bank of the United States, is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof sus-

tain important relations to the Government of the United States." 115 U. S. at page 14.

From the date of its incorporation by an Act of Congress approved March 3, 1871, and its organization thereunder, to January 28th, 1915, the Texas and Pacific Railway Company by virtue of its federal charter and the provisions thereof has quite uniformly been able to sue and be sued, formerly in the United States Circuit Court and latterly in the United States District Court.

Section 5, of an Act amending an Act entitled "An Act to Codify, Revise and Amend the Laws relating to the Judiciary, Approved," approved January 28, 1915, reads as follows:

"No court of the United States shall have jurisdiction of
165 any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

It has been asserted in argument and it has been uncontroverted that at the time of the passage and approval by congress of the Act containing Section 5, the Texas & Pacific Railway Company was the only railroad in the United States operating under a federal charter and by virtue thereof having the right to sue or be sued in the courts of the United States. It was also asserted that because of the original jurisdiction of the United States Courts in suits in which this railway company was the defendant it had and enjoyed the right of removal from the state courts to the United States Courts under the provisions of the Removal Act. It is stated that the Congress had in mind the defendant company in incorporating the foregoing clause in the laws relating to the judiciary.

Counsel for the complainant contends that the reasoning of Chief Justice Marshall in Osborn v. The Bank came in process of time to be forgotten and dropped out of sight, and that there came to exist the substantive bare fact that a federal charter gives federal jurisdiction. Upon this contention counsel bases his interpretation of the meaning and effect of Section 5. He argues that the purpose and intention of Congress was to do away with the jurisdiction in the United States Courts of cases brought by or against a railroad company where such jurisdiction has heretofore obtained as he contends, by virtue of the mere possession by the company of a federal charter.

The construction sought to be place- upon this section by counsel would separate and divorce the Act of congress incorporating a railroad company from the substance of the Act granting to the company its functions, powers, and privileges. Such a construction is impossible. It would limit and circumscribe the meaning of section 5 in a manner I am sure, not contemplated by congress. It would render the process of reasoning indulged by Chief Justice Marshall in the Bank case without pertinence and unavailing to support the conclusion reached by him. It would deprive the Supreme
166 Court of the premises always and uniformly entertained by it in reaching and indulging its conclusion that a federal charter in connection with its provisions involves at least potentially, a federal question. Besides: In event the court should place the construction upon section 5 limiting and circumscribing its effect and

operation, continued uncertainty would obtain as to whether or not the facts in a given case caused it to fall within or without the provisions of this section. This would be a very unhappy situation and one calculated to promote confusion rather than order. A federal charter with its form and substance should be treated as an inextricable identity.

That the bill of complaint in this cause praying a foreclosure of the second mortgage of the Texas and Pacific Railway Company, and for injunction, accounting and other equitable relief raises federal questions because of the fact this railway is incorporated under an Act of Congress authorizing the making of the mortgage contract complainant seeks to foreclose, is unquestioned. But these federal questions arising only by virtue of the law of its incorporation have been rendered of no avail by section 5, of the Act approved January 28th, 1915, so far as the conferring of jurisdiction on this court is concerned. It is not contended that other and different federal questions are pleaded or relied upon in the conferring of such jurisdiction.

Argument has been made by counsel for complainant seeking to sustain the jurisdiction of the court on the ground of diversity of citizenship, it being urged that complainant is a citizen of the State of New York and the defendant Railway Company is a resident and citizen of Texas. In my opinion the allegations of the bill pertaining to jurisdiction are not sufficient to warrant the court in entertaining this contention.

The bill will therefore stand dismissed.

EDWARD R. MEEK, *Judge.*

167 *Plaintiff's Petition for Appeal with Endorsed Allowance.*

Filed March 3rd, 1916.

Plaintiff's Petition for Appeal.

To the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas:

Bankers Trust Company, as Trustee, the plaintiff in the above styled cause, conceiving itself aggrieved by the decree therein entered of date February 23, 1916, whereby its amended bill of complaint was dismissed as to both defendants, without decision upon the merits and solely upon the ground that the court was without jurisdiction to entertain the same, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in its assignment of errors filed herewith; and it prays that its appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

LOCKE & LOCKE,
ALEXANDER & GREEN, L.,
Solicitors for Plaintiff.

MAURICE E. LOCKE,
W. W. GREEN, L.,
Of Counsel for Plaintiff.

The foregoing claim of appeal is allowed for reference to the jurisdictional question which alone is involved. Done at Dallas, Texas, this the 3rd day of March, 1916.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

168 *Order Allowing Appeal.*

Filed March 3, 1916.

Order Allowing Appeal in Open Court.

On this the 3rd day of March, 1916, comes on to be heard in open court the petition of the plaintiff in the above styled cause for an appeal to the Supreme Court of the United States from the decree entered of date February 23, 1916, dismissing the amended bill of complaint as to both defendants solely upon the ground that the court was without jurisdiction to entertain the same; and upon consideration said appeal is allowed for the review of said decree with reference to the jurisdictional question which alone is involved.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

169 *Plaintiff's Assignment of Errors.*

Filed March 3rd, 1916.

In the District Court of the United States for the Northern District of Texas, Sitting at Dallas.

In Equity. No. 2795/51.

BANKERS TRUST COMPANY, as Trustee,
v.
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

Plaintiff's Assignment of Errors.

In connection with its petition for an appeal this day filed in the above styled cause, the plaintiff assigns the following errors committed upon the trial thereof.

1.

The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

2.

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause by reason of the express grant of such jurisdiction in the act of congress of March 3, 1871.

3.

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution or laws of the United States.

170 4.

The court erred in holding that it had not jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states.

For the reasons hereinbefore assigned, the plaintiff prays that the decree entered in said cause of date February 23, 1916, be reversed by the Supreme Court of the United States, and that said cause be remanded to the District Court of the United States for the Northern District of Texas with instructions to take jurisdiction of the same and to hear and determine the merits thereof.

LOCKE & LOCKE,
ALEXANDER & GREEN, L.,
Solicitors for Plaintiff.

MAURICE E. LOCKE,
W. W. GREEN, L.,
Of Counsel for Plaintiff.

171 *Plaintiff's Appeal Bond.*

Filed March 3, 1916.

Plaintiff's Appeal Bond.

Whereas, in the above styled cause, then pending in the District Court of the United States for the Northern District of Texas, sitting at Dallas, said court did, on to-wit February 23, 1916, render a final decree dismissing said cause as to both the defendants without consideration of the merits thereof, and solely upon the ground that said court was without jurisdiction to hear and determine the same. And whereas the plaintiff has taken an appeal to the Supreme Court of the United States to reverse said decree.

Now, therefore, know all men by these presents that the said plaintiff, Bankers Trust Company, a private corporation having its domicile in the city, county and state of New York and suing and acting herein as a trustee as set forth in its amended bill of complaint, as principal, and as surety American Surety Company, a private corporation having its domicile in the city, county and state of New York and authorized by its charter and by compliance with the laws of the state of Texas to do business in Texas as a surety company, do hereby acknowledge themselves jointly and severally bound unto the said defendants The Texas and Pacific Railway Company, a private corporation having its domicile in the city and county of Dallas and state of Texas, and New Orleans Pacific Railway Company, a private corporation having its domicile in the city of New Orleans, parish of Orleans, and state of Louisiana, in the sum of one thousand dollars, well and truly to be paid to them or to their successors or assigns.

The condition of this bond, however, is such that if said Bankers Trust Company, as Trustee, shall prosecute its appeal to effect, and, if it shall fail to make its appeal good, shall answer all costs,
172 then this bond shall become null; otherwise, it shall remain in full force and effect.

In testimony whereof said Bankers Trust Company, as Trustee, has caused these presents to be signed in its name and behalf by Maurice E. Locke, one of its solicitors of record and its agent thereunto duly authorized; and said American Surety Company has caused these presents to be signed in its name and behalf, and its corporate seal to be thereunto affixed, by its agent J. W. Blanton and its resident secretary R. L. Stennis, thereunto duly authorized, at Dallas, Texas, this the 3rd day of March, 1916.

BANKERS TRUST COMPANY,
As Trustee,
By MAURICE E. LOCKE,
Its Solicitor and Agent.

[SEAL.] AMERICAN SURETY COMPANY,
By J. W. BLANTON, *Its Agent, and*
R. L. STENNIS, *Its Resident Secretary.*

The amount of the plaintiff's appeal bond is hereby fixed at one thousand dollars and the foregoing bond is hereby approved, this the 3rd day of March, 1916.

E. R. MEEK,
Judge of the District Court of the United States for the Northern District of Texas.

173 *Plaintiff-Appellant's Præcipe for Transcript.*

Filed March 3rd, 1916.

Plaintiff-Appellant's Præcipe for Transcript.

The clerk will please to include in the transcript, and among the papers, to be transmitted to the Supreme Court of the United States

in connection with the appeal of the above styled cause copies of papers and original papers as follows, towit.

1. Back of original bill of complaint, showing nature of document and clerk's file-mark.

2. Title page of amendments to original bill of complaint, showing nature of document and clerk's file-mark.

3. Plaintiff's amended bill of complaint.

4. Motion of defendant New Orleans Pacific Railway Company to dismiss as to it.

5. Motion of defendant The Texas and Pacific Railway Company to dismiss the bill.

6. Back of original answer of defendant The Texas and Pacific Railway Company's original answer, showing nature of document and clerk's file-mark.

7. Title page of defendant The Texas and Pacific Railway Company's amendments to its orignal answer, showing nature of document and clerk's file-mark.

8. Amended answer of defendant The Texas and Pacific Railway Company.

9. Order of dismissal.

10. Memorandum opinion of district judge.

11. Petition for appeal and endorsed allowance thereof.

12. Allowance of appeal in open court.

13. Assignment of errors.

14. Appeal bond.

14½. This præcipe and acknowledgment of service thereof.

Original Papers.

15. Citation on appeal and endorsed admission of service thereof.

174 LOCKE & LOCKE,
ALEXANDER & GREEN, L.,
Solicitors for the Plaintiff-Appellant.

Receipt of a copy of the foregoing præcipe is hereby acknowledged this the 3 day of March, 1916.

T. J. FREEMAN,
GEO. THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
Solicitors for Both the Defendants-Appellees.

175 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, within thirty days from the date of this writ, pursuant

to an appeal, duly allowed by the District Court of the United States for the Northern District of Texas and filed in the clerk's office of said court on the 3rd day or March, 1916; in a cause wherein Bankers Trust Company, as Trustee, is the appellant and you are the appellees, to show cause, if any, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 3rd day of March, 1916.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

Attest with seal.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of the District Court of the United States for the Northern District of Texas.

176 Service of the foregoing citation and receipt of a copy thereof are hereby admitted this the 3 day of March, 1916.

T. J. FREEMAN,
GEO. THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
Solicitors for The Texas and Pacific Railway Company and for New Orleans Pacific Railway Company.

177 [Endorsed:] In Equity, No. 2795/51. Bankers Trust Company, as Trustee, v. The Texas and Pacific Railway Company and New Orleans Pacific Railway Company. Citation on Appeal. Filed 3 day of M'ch 19—. Louis C. Maynard, clerk.

178 *Clerk's Certificate.*

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing is a true and correct transcript of the record, assignments of error and all proceedings had upon the motions of the respective defendants to dismiss the bill of complaint in cause No. 2795/51, In Equity, Bankers Trust Company, as Trustee, complainant and the Texas and Pacific Railway Company and the New Orleans Pacific Railway company, defendants, as fully as the same remain on file and of record in my office at Dallas, Texas, except that the original citation on appeal is included herein instead of a copy thereof.

Witness my hand officially and the seal of said District Court, at

Dallas, Texas, this the 4th day of March A. D. 1916, and of American Independence the 140th year.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of said Court.

Endorsed on cover: File No. 25,172. N. Texas, D. C. U. S. Term No. 889. Bankers Trust Company, as trustee, appellant, vs. The Texas & Pacific Railway Company and New Orleans Pacific Railway Company. Filed March 10th, 1916. File No. 25,172.

Office Supreme Court, U. S.
FILED
MAR 14 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

MOTION TO ADVANCE.

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Solicitors for Appellant.

FREDERIC D. McKENNEY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY, APPELLEES.

MOTION TO ADVANCE.

Now comes the above-named appellant, the Bankers Trust Company, as trustee, and because of the special and peculiar circumstances attending the matters with which this appeal is concerned and the very considerable public interests which are involved therein, moves this honorable court to advance this case, under the provisions of paragraph 7 of rule 26, for hearing out of its regular order in the call of the docket, and as the only matter open for argument on this appeal is one of jurisdiction *vel non* of the United States District Court for the Northern District of Texas, and it is believed that such question can be satisfactorily argued in one hour of

thirty minutes to each side, it is respectfully suggested that the case be ordered to the summary docket for hearing under the provisions of paragraph 6 of rule 6 of this court.

As grounds for such motion appellant respectfully states and shows as follows, to wit:

The sole question for the consideration of this court upon this appeal is as to the jurisdiction *vel non* of the United States District Court for the Northern District of Texas (Hon. Edward R. Meek, district judge, sitting) to entertain the bill of complaint herein.

The appeal was prayed direct to this court by Bankers Trust Company, as trustee, complainant below, and duly allowed by the district court on March 3, 1916, to review the order and decree of the latter court passed on the 23d day of February, A. D. 1916, dismissing said bill of complaint, the order allowing said appeal being as follows, viz:

Order Allowing Appeal in Open Court.

> "On this the 3d day of March, 1916, comes on to be heard in open court the petition of the plaintiff in the above styled cause for an appeal to the Supreme Court of the United States from the decree entered of date February 23, 1916, dismissing the amended bill of complaint as to both defendants solely upon the ground that the court was without jurisdiction to entertain the same; and upon consideration said appeal is allowed for the review of said decree with reference to the jurisdictional question which alone is involved.
>
> "E. R. MEEK,
> *"United States District Judge for the Northern District of Texas."*

Appellant's amended bill of complaint was filed in said district court in its character as trustee under the second mortgage of The Texas and Pacific Railway Company and New Orleans Pacific Railway Company securing an issue of

second mortgage income bonds of The Texas and Pacific Railway Company, limited in aggregate principal amount to $25,000,000, of which there are more than $24,000,000 principal amount now outstanding. The bill alleges default made in the payment of interest on said income bonds for a number of years past; that the net income of The Texas and Pacific Railway Company applicable to the payment of interest on said income bonds has been systematically diverted to purposes other than the payment of such interest, in violation of the provisions of said income bonds and said second mortgage, and prays for an accounting and foreclosure. It further alleges that The Texas and Pacific Railway Company is insolvent; that its property holdings, including its lines of railway, are in danger of being broken up by separate suits, judgments, executions, and attachments, and prays for the appointment of a receiver and an injunction.

Upon such amended bill and papers in support thereof motion was made in said district court by said appellant for immediate preliminary relief pending the hearing on the merits and asking the appointment of a receiver and an injunction, among other things, against further diversion of net income. The Texas and Pacific Railway Company thereupon moved to dismiss the bill for alleged lack of jurisdiction on the part of the district court as a Federal court to entertain the same, and the New Orleans Pacific Railway Company also moved for dismissal as to it. Both motions having come on to be heard on February 16, 1916, and succeeding days, the motion of The Texas and Pacific Railway Company was granted and the bill was dismissed as to both defendants on the sole ground that the court was without jurisdiction to entertain the same because of the provisions of the act of Congress approved January 28, 1915 (38 Stats. at L., 803, 804, chap. 22, sec. 5), reading as follows:

> "SEC. 5. No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress."

REASONS FOR ADVANCEMENT.

The railroad system of The Texas and Pacific Railway Company, one of the appellees here, is more than 1,800 miles in length and extends through the States of Texas, Louisiana and Arkansas, and is a great public highway of interstate commerce, as well as by the terms of its charter a military and post-road of the United States. The inhabitants of said States and the traveling and shipping public generally, as well as the governments of said States and of the United States itself, are immediately and directly interested in the continuous and efficient operation of said railway company as a single entity. It has made default in payment of its promissory notes aggregating more than $3,400,000 principal amount, which matured on June 1, 1915. Suit has been instituted and is now pending in the Supreme Court of New York against said appellee by the holders of more than $1,700,000 principal amount of said notes, and certain property of the appellee, to wit, its cash account and large amounts of securities in its treasury, has been taken into judicial custody under attachment proceedings in said suit: said holders of said notes have also commenced attachment proceedings in the State courts of Louisiana against other property of said appellee, and there has also been taken and is now in judicial custody under said proceedings a large amount of its property. Other holders of more than $800,000 principal amount of said notes also have instituted suit thereon against said appellee in the United States District Court for the Western District of Louisiana, and holders of an approximately like principal amount have instituted suit thereon against the appellee in the State courts of Texas. The pendency of such suits and of this cause has further shattered and impaired the previously weakened credit of the appellee and seriously embarrasses the necessary financing to provide for current repairs

to road-bed and equipment, and tends to prevent adequate provision being made to meet the requirements of the traveling and shipping public and of the Interstate Commerce Commission and of the railroad commissions of said States. The attachment proceedings in two of said suits embarrass and hinder the actual conduct of the financial affairs of the appellee and the operation of its road.

There is grave danger that long before this cause will be reached for argument in the regular call of the docket of this court judgment will have been obtained in some or all of said suits, and of other suits which may be instituted against the appellee, and that its railway lines will be levied upon and sold in parcels, thus sacrificing and dismembering its system, to the detriment, not only of your orator and of all stockholders, bondholders, and creditors of the appellee, but also of the inhabitants of said States of Texas, Louisiana, and Arkansas particularly and of the traveling and shipping public generally and of the United States Government. Public interest, as well as the interest of security holders, demands that the property of the appellee be placed in the custody and control of a court of equity, which can protect it against judgments and dismemberments and administer it in the interests of all concerned. The limited jurisdiction of State courts renders their procedure entirely inadequate for such purposes, and would necessitate separate administration by several courts of independent jurisdiction, operating under different systems of law. The only court of equity which can adequately protect and administer said property is a United States district court, but until the question of jurisdiction underlying this appeal shall have been disposed of by this court it is very doubtful whether any action by such court directed to such end can be taken. There is grave danger that applications for several receivers may be made in various State courts during the pendency of this appeal if the hearing thereof should be delayed, and that such applications may result in conflicting administrations

of the properties of the Texas and Pacific Railway Company, all of which action would necessarily be superseded by the appointment of a receiver in this cause in case this court should ultimately determine that the district court has jurisdiction of this cause.

The past course of the appellee railway company, as disclosed by the bill, shows that said company denies the rights of the appellant, and will persist in disregarding them and in diverting its net income and placing the same beyond the reach of the appellant, unless restrained by the interlocutory injunction sought; but no injunction for the appellant's protection pending the suit can be had until the question of jurisdiction shall have been determined by this court.

Wherefore appellant prays that this case may be advanced and assigned for argument on such day as may suit the convenience of the court.

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Solicitors for Appellant.

FREDERIC D. McKENNEY,
Of Counsel.

SIRS: Please take notice that on the 16th day of March, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, the foregoing motion to advance this cause and assign same for argument will be submitted to the Supreme Court of the United States.

Dated New York, March 11, 1916.

MAURICE E. LOCKE,
Prætorian Building, Dallas, Texas,
WILLIAM W. GREEN,
120 *Broadway, New York City,*
Solicitors for Appellant.

To

THOMAS J. FREEMAN,
GEORGE THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
CHADBOURNE & SHORES,
Solicitors for Appellees.

Service of a copy of the foregoing motion to advance and notice of intention to submit same is admitted this eleventh day of March, 1916.

CHADBOURNE & SHORES,
Solicitors for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, *as Trustee, Appellant,*
against
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, *Appellees.*

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

ADOLPH DENZAU, being duly sworn, says that he is upwards of twenty-one years of age and is employed in the office of William W. Green, one of the solicitors for the appellant herein; that on the 11th day of March, 1916, he did serve upon The Texas and Pacific Railway Company, one of the appellees herein, a copy of the annexed motion to advance by delivering a true copy of said motion to advance to C. W. Veitch, the secretary and treasurer of said The Texas and Pacific Railway Company, at his office, No. 165 Broadway, in the City of New York (Borough of Manhattan), New York, and by leaving the same with him.

Deponent further says that he knows the said C. W. Veitch so served as aforesaid to be the secretary and treasurer of said The Texas and Pacific Railway Company.

ADOLPH DENZAU.

Subscribed and sworn to before me this 11th day of March, 1916.

[NOTARIAL SEAL.] R. DAMM,
Notary Public, Kings County.

Certificate filed in New York County, No. 54.

[Endorsed:] Copy. In the Supreme Court of the United States. No. 889. O. T., 1915. Bankers' Trust Company, as trustee, appellant, *vs.* The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, appellees. Motion to advance.

Office Supreme Court, U. S.
FILED
MAR 16 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

BANKERS TRUST COMPANY

versus No. 889

THE TEXAS & PACIFIC RAILWAY CO., ET AL.

Motion of Railroad Commission of Louisiana, Amicus Curiae, to Advance.

W. M. BARROW,
Assistant Attorney General.

Supreme Court of the United States

BANKERS TRUST COMPANY

versus No. ——

THE TEXAS & PACIFIC RAILWAY CO., ET AL.

Motion of Railroad Commission of Louisiana, Amicus Curiae, to Advance.

Now comes the Railroad Commission of Louisiana, and, praying leave to appear as amicus curiae in this cause, says, that it is a matter of public interest to the State of Louisiana, its citizens, and shippers, who travel and ship over the Texas & Pacific Railway and who do and may at any time have litigation with the said Texas & Pacific Railway, that the question of jurisdiction involved herein be determined as speedily as possible, and, in order that the defendant may perform its function as a common carrier to the best interests of all concerned, it is necessary that the jurisdictional question and the issues involved in this litigaton be determined without delay. Wherefore, the Railroad Commission of Louisiana moves that this cause be advanced and placed upon the summary docket, to be heard and disposed of as soon as convenient to the Court.

RAILROAD COMMISSION OF LOUISIANA.

W. M. BARROW,

Assistant Attorney General.

Office Supreme Court, U. S.
FILED
MAR 16 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.
No. 884.

BANKERS TRUST COMPANY, AS TRUSTEE,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
Appellees.

ANSWER OF THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE NEW ORLEANS PACIFIC RAILWAY COMPANY TO APPELLANT'S MOTION TO ADVANCE.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
Solicitors for Appellees.

T. L. CHADBOURNE,
A. J. SHORES,
Of Counsel.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 889.

BANKERS TRUST COMPANY, as Trustee,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
Appellees.

Answer of The Texas and Pacific Railway Company and The New Orleans Pacific Railway Company to Appellant's Motion to Advance.

Now come the Appellees herein, The Texas and Pacific Railway Company and The New

Orleans Pacific Railway Company, and for answer to the motion of Appellant filed herein March 11, 1916, to advance this cause under the provisions of Paragraph 7, Rule 26, of this Court, and asking that this cause be ordered to the Summary Docket for hearing under the provisions of Paragraph 6 of Rule 6, of this Court, answering, says:

That this cause is not such a one as should be advanced for summary hearing under said rules, but that same should be heard in regular order on the call of the docket.

Appellees admit as true the statement that the only matter open for argument is one of jurisdiction of the United States District Court of the Northern District of Texas, but they state that such question cannot be satisfactorily argued in one hour of thirty minutes to each side. On the contrary, Appellees say that to limit the argument to thirty minutes for each side would, in effect, be equivalent to submitting the cause without argument, as the questions of law involved are intricate and to be fairly and fully presented to this Court will require and consume much more time than that provided by the rules of this Court for causes advanced for summary hearing.

That the sole question submitted to and determined by the Court below—viz., the United States District Court for the Northern District of

Texas (Hon. E. R. Meek, District Judge)—was the jurisdiction of said Court over this action by reason of the provisions of the Act of Congress approved January 25, 1915 (38 Stat. at L. 803, 804, Chap. 22, Sec. 5), reading as follows:

> "Sec. 5. No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

That said Act of Congress has never been before any court for construction, and that arguments on this question in the Court below consumed the greater portion of five days.

That said question of jurisdiction is the only question to be submitted to this Court for review, and that the appeal to this Court was allowed with reference to said question alone.

That if such question is to be argued before this Court much more time than thirty minutes to each side must necessarily be consumed by such argument.

That the determination of this question of jurisdiction is of vital importance to the Texas and Pacific Railway Company inasmuch as it involves not only the jurisdiction of this cause but also the right of said company to sue and be sued in the Courts of the United States, a right which said

company has uniformly exercised and invoked for more than forty years, and in the decision of said question it is important that this Court should be advised to the fullest extent of all considerations and arguments bearing thereon and ample opportunity granted to the Texas and Pacific Railway Company to present such question in all of its aspects and phases.

The Appellee, The Texas and Pacific Railway Company, would state that, in truth and fact, it is the only real defendant in this cause, as its co-defendant, The New Orleans Pacific Railway Company, has no substantial interest in said cause. That this Appellee, The Texas and Pacific Railway Company, has filed its amended answer to Complainant's amended bill in this cause, and in said answer it has expressly denied that it is indebted to the Plaintiff in any amount and has expressly denied that Complainant is entitled to any recovery against it for any sum, or to any right of foreclosure of said Second Mortgage. That no default has been made by this Appellee in any of the conditions or obligations imposed by said Second Mortgage. This Appellee has further expressly denied in said answer that it is insolvent.

That this cause was instituted at the request of the receiver of the St. Louis, Iron Mountain and Southern Railway Company—the same individual

who is also receiver of The Missouri Pacific Railway Company—as a part of a plan or scheme for the acquisition of the property of The Texas and Pacific Railway Company by or in the interest of The Missouri Pacific Railway Company, which said acquisition by The Missouri Pacific Railway Company is contrary to and prohibited by law and will constitute a violation of the statutes of the United States—especially the Sherman Anti-Trust statute—as well as a combination in restraint of trade and a monoply of interstate trade, whereby competition in interstate commerce would be unduly restricted and suppressed. That shortly after the filing of the bill of complaint in this cause, and for the purpose of emphasizing and sustaining those portions of said bill which alleged the inability of The Texas and Pacific Railway Company to meet certain of its matured notes, the receiver of St. Louis, Iron Mountain and Southern Railway Company—said company being the owner of a large amount of said notes—caused an action to be instituted upon the same against The Texas and Pacific Railway Company in the United States District Court for the Eastern District of Louisiana; and shortly thereafter, and by reason of the action so taken by said receiver, the Union Trust Company of New York, as pledgee of a

large amount of said notes, owned by The Missouri Pacific Railway Company, also caused an action to be instituted in respect thereof against The Texas and Pacific Railway Company in the State Court at Dallas, Texas. That in its amended answer to the amended bill of complaint in this cause this appellee has pleaded that it has a good and substantial defence to the above actions instituted in respect of the afore said notes.

That the only other action which has been instituted in respect of notes of this appellee is an action instituted by the Estate of Jay Gould in the Supreme Court of the State of New York, which said action was so instituted solely because of the institution of this cause, and that it is not true, as stated in said motion, that said suits or any proceedings therein has embarrassed and hindered the financial affairs of the appellee or the operation of its road; neither is it true, as stated in said motion, that public interest, as well as the interest of security holders, demands that the property of this appellee be placed in the custody and control of a court of equity, but, on the contrary, the sole purpose and object for the institution of this cause and the application by the complainant herein for a receiver of the railroads and property of this appellee is to secure, through the

aid of the Federal Courts and by authority of their decrees, the ownership and control of the property of the appellee by The Missouri Pacific Railway Company, as a result of which ownership and control the natural competition in interstate commerce between said companies would be suppressed and their operation would be secured to a single dominating control, which would be exercised primarily for the benefit and advantage of The Missouri Pacific Railway Company.

That the matters and things complained of in Complainant's bill have existed for a period of more than twenty-six years and with full knowledge of such conditions as to the payment or non-payment of interest on the Second Mortgage Bonds of this Company, said Trustees and said Bondholders have acquiesced in the action taken by the Board of Directors of the Texas and Pacific Railway Company as to the payment or non-payment of interest on said Income Bonds.

That, in truth and in fact, this Appellee has fully carried out and performed all of the conditions and obligations imposed upon it by said Second Mortgage and in no instance has it diverted funds from their proper source or applied same to any other purpose not specifically called for by said Mortgage. This Appellee would further

state that the grave dangers outlined in the motion filed herein, either as to the public or as to the stockholders of this Appellee, only exist in the imagination of Appellant's counsel and not in reality. That the credit of this Appellee, prior to the institution of this cause, was unquestioned. That the effect of bringing the present suit was a libel upon the credit of this Appellee. That this Appellee was, and is now, meeting all of its commercial obligations of every kind, and this Appellee now reiterates, as its answer to this motion what it has specifically set out in its answer to the bill of complaint herein, —that it is not indebted to the complainant therein in any sum.

That it has not breached in any wise any provi sion of the Second Mortgage and that the Complainant herein has no just cause of action.

In further answering said motion to advance, the Appellees ask that this cause be regularly docketed and that the Appellees be given a full and fair opportunity to properly present to this Court the questions involved herein, and they respectfully submit that said questions cannot properly and fairly be submitted if this cause is placed upon the summary docket and the argument limited to thirty minutes on each side.

Wherefore, they resist said motion to advance and ask that same be denied.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
Solicitors for Appellees.

T. L. CHADBOURNE,
A. J. SHORES,
Of Counsel.

To

ALEXANDER & GREEN,
LOCKE & LOCKE,
Counsel for Appellant,
Bankers Trust Company.

Service of a copy of the foregoing Answer to Motion to Advance is admitted this 15th day of March 1916.

Solicitors for Appellants.

FILED
MAR 27 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term, 1915

No. 889

BANKERS TRUST COMPANY, as Trustee,

Appellant,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR APPELLANT

MAURICE E. LOCKE, Dallas, Texas,
WILLIAM W. GREEN, New York City,
Solicitors for Appellant

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Supreme Court of the United States

OCTOBER TERM, 1915

BANKERS TRUST COMPANY, as Trustee, v. THE TEXAS AND PACIFIC RAILWAY COMPANY et al.	Term No. 889

BRIEF FOR APPELLANT

Statement of Case

This is a suit for foreclosure of a railroad second mortgage securing income bonds, because of default in the payment of interest, and for an accounting, and for an injunction restraining the diversion to other uses of income applicable to the payment of interest, and for a receivership.

All citations to the transcript refer to the top paging of the printed transcript, to which are added where indicated references to folios and marginal paging. All italics are ours.

The amount in controversy is alleged (Tr. 45, fol. 150) to exceed the sum of $5,000, exclusive of interest and costs, and in fact it is several millions of dollars.

It is alleged (Tr., 1-2, fol. 3) that the plaintiff is a corporation of the state of New York, and (Tr. 2, fol. 6) that the defendant New Orleans Pacific Railway Company is a corporation of the state of Louisiana. As to the defendant The Texas and Pacific Railway Company, called also the Texas company, it is alleged (Tr., 2, fol. 5,) that it is "a corporation duly created by and existing under the laws of the United States of America, and has its principal place of business and its principal operating and general offices in the city of Dallas in the state of Texas, in the Dallas division of the northern district of Texas, and that a material and substantial part of the railroads owned and operated by it as hereinafter described, to wit, over four hundred miles thereof, are located in said northern district of Texas, and the defendant Texas company is a resident and inhabitant of the said Dallas division of said northern district of Texas." The mortgage in suit, a copy of which is made an exhibit to the bill, recites (Tr., 50) that said company is "a corporation created by and existing under the laws of the United States of America, and of the states of Louisiana and Texas."

The defendant The Texas and Pacific Railway Company was incorporated by the act of Congress of March 3, 1871 (16 Stat. at L. 573), which act was supplemented by the act of May 2, 1872 (17 Stat. at L. 59), and by the act of March 3, 1873 (17 Stat. at L. 598), and by the act of June 22, 1874, (18 Stat. at L. 197). These four acts contain many and detailed provisions regarding the power of the company to borrow money and to mortgage its property as security therefor. The existence of these acts is pleaded, and the provisions thereof relevant to the company's power to mortgage its property are set forth at length

in the bill (Tr., 2-7, fols. 7-21). The terms of the bonds and mortgage also are pleaded, and a copy of the mortgage is made an exhibit to the bill (Tr., 12-30, 49-87). In section 1 of the act of March 3, 1871, it is provided that the company "shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States". The provisions of these various acts will be set forth more fully in connection with the discussion of the second and third specifications of error.

The plaintiff claimed in the district court, and claims here, that the district court has jurisdiction of this cause (1) by reason of the express grant of jurisdiction contained in section 1 of the act of March 3, 1871, (2) because of the existence of a federal question, and (3) on account of diversity of citizenship.

The defendant New Orleans Pacific Railway Company filed a motion to dismiss as to it upon the ground that it was not suable in the northern district of Texas, it being an inhabitant of the eastern district of Louisiana (Tr., 97-98; marg. pp. 101-103). The court denied this motion (Tr., 138, marg. p. 161), and of this ruling the plaintiff of course does not complain.

The court dismissed the bill as to both defendants on motion of the defendant The Texas and Pacific Railway Company, and upon the sole ground that it was without jurisdiction to entertain the same (Tr., 98-100, 138-139; marg. pp. 104-106, 161), holding that its jurisdiction of the cause by reason of the express grant of jurisdiction in the charter and because of the existence of a federal question had been taken away by section 5 of the act of January 28, 1915 (38 Stat. at L. 803), and holding that the bill did not show jurisdiction

on account of diversity of citizenship (Tr., 139-142; marg. pp. 162-166).

This appeal is prosecuted for the sole purpose of reviewing the ruling of the district court that it was without jurisdiction of the cause, which ruling presents the only question involved in the order of dismissal (Tr., 138-144; marg. pp. 161, 162-166, 167, 168, and 169-170).

Specifications of Error

1

The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

2

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause by reason of the express grant of such jurisdiction in the act of congress of March 3, 1871.

3

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution or laws of the United States.

The court erred in holding that it had not jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states.

Brief of the Argument

JURISDICTION BY VIRTUE OF GRANT THEREOF IN CHARTER

SPECIFICATIONS OF ERROR

1. The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

2. The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause by reason of the express grant of such jurisdiction in the act of congress of March 3, 1871.

First Proposition

Jurisdiction to hear and determine such suits as this against The Texas and Pacific Railway Company was expressly vested in the appropriate federal courts by the act of congress incorporating said company.

Authorities

Act of March 3, 1871, ch. 122, § 1, 16 Stat. at L. 573; Act of May 2, 1872, ch. 132, § 1, 17 Stat. at L. 59; Smith v. Union Pacific R. Co., 2 Dillon 278, 22 Fed. Cas. 694; Bauman v. Union Pacific R. Co., 3 Dillon 367, 2 Fed. Cas. 1,043; Pacific Railroad Removal Cases, 115 U. S. 1 (24); Matter of Dunn, 212 U. S. 374 (384); Osborn v. Bank of the United States, 9 Wheaton 738; Magill v. Parsons, 4 Conn. 317-336.

Argument

It was decided in 1820-1822 by Justices Todd and Washington on circuit, and by the supreme court of Connecticut (Magill v. Parsons, 4 Conn. 317-336), and in 1824 it was definitively settled by the classic reasoning of Chief Justice Marshall in Osborn v. Bank of the United States, 9 Wheaton 738, that under the constitution congress has the power to confer upon the federal courts jurisdiction of suits by or against corporations created by act of congress. Therefore the only question open to debate in this connection is whether congress has expressly conferred upon the appropriate federal courts jurisdiction of such a suit as this against The Texas and Pacific Railway Company, or, to state the question conversely, whether congress has expressly subjected The Texas and Pacific Railway Company to the jurisdiction of the appropriate federal courts with reference to such a suit as this against it.

By the act of March 3, 1871 (16 Stat. at L. 573), congress incorporated Texas Pacific Railroad Company, and by section 1 of that act provided that such corporation should "be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." The act of May 2, 1872 (17 Stat. at L. 59), was denominated by its title an act supplementary to the act of March 3, 1871. By section 1 of said act congress provided that the name of Texas Pacific Railroad Company thereafter should be The Texas and Pacific Railway Company, and that said The Texas and Pacific Railway Company should have, possess, and enjoy all the rights, privileges, and franchises theretofore conferred upon the said Texas Pacific Railroad Company. The question is whether the language above quoted from section 1 of the act of March 3, 1871, imported a grant to the appropriate federal courts of jurisdiction of suits by or against the company.

Certainly if this language be construed in accordance with its literal meaning it must be held to have conferred such jurisdiction. In 1871 the circuit and district courts were courts of law and equity within the United States, and now the district court is a court of law and equity within the United States possessing most of the original jurisdiction then vested in the two courts. The case at bar is a suit whose amount and character are such as to bring it within the jurisdiction of a United States district court, sitting as a court of equity. Therefore, unless this statute is to be construed as meaning something different from and less than its literal signification, the present suit is one whereof jurisdiction was conferred upon the

district court by the act of March 3, 1871, and the act of 1911 transferring to the district court the jurisdiction formerly appertaining to the circuit court.

Doubtless it will be contended that the language quoted means nothing more than to say that the company may sue and be sued in any court having jurisdiction of the persons and the cause of action. The power to sue and the liability to be sued in any court having jurisdiction of the persons and the cause of action are inherent in every corporation. The mere fact of corporate existence implies such a power and such a liability. It is contrary to elementary rules of interpretation needlessly to say that congress did not mean to accomplish anything by the use of this language, or that it meant that the statute including this language should signify precisely what it would signify without it.

When the Union Pacific Railroad Company was chartered in 1862, the country through which it was to run was peopled mainly by Indians and pioneers, and social and legal conditions were crude. When The Texas and Pacific Railway Company was chartered in 1871, the greater part of the country through which it was to pass was in the hands of Indians, Mexicans and pioneers. As to the remainder, the prevailing conditions were even worse, for those were the days of reconstruction, when carpetbagger and Ku Klux clansman were struggling for control. Congress incorporated these companies, and aided them in the construction of their roads, for the accomplishment of great public ends. It may well have thought that the federal courts were likely to be of higher character than those organized locally in such circum-

stances. And it may well have deemed it safer that these corporations which it was creating and endowing for public service, should be subject to the jurisdiction of the federal courts, and have the right of access to the federal courts.

The charter of the first Bank of the United States (1 Stat. at L. 191) provided in section 3 that the bank should be able "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." And in paragraph 9 of section 7 it provided that the directors of the bank should be individually liable for its debts in excess of certain limits, and that for the recovery thereof creditors of the bank might sue them or any of them "in any court of record of the United States, or of either of them." In 1808 the bank instituted in the circuit court for the district of Georgia an action to recover money which had been taken from it for taxes by state officials. The circuit court held that it had no jurisdiction. Upon appeal to this Court in 1809 counsel so eminent as Horace Binney argued (1) that congress had under the constitution power to authorize the bank to sue in the circuit court, and (2) that by the clause above quoted from section 3 of the charter congress had done this. This Court, speaking through Chief Justice Marshall, held that the language quoted from section 3 merely gave to the corporation the capacity to appear "in any court which would, by law, have cognizance of the cause, if brought by individuals." As conclusive evidence of the correctness of this interpretation of the clause and the error of the interpretation urged by Mr. Binney, the chief justice referred to the clause above quoted from paragraph 9 of section

7, and said: "That section * * * expressly authorizes the bringing of that action in the federal or state courts." Bank of the United States v. Deveaux, 5 Cranch 61 (71 and 85-6).

The charter of the second Bank of the United States (3 Stat. at L. 266) provided in section 7 that the bank should be able "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." In Osborn v. Bank of the United States, 9 Wheaton 738 (816), this Court, speaking again through Chief Justice Marshall, held that this language, unlike that in section 3 of the charter of the first Bank of the United States, conferred, in words which admitted of only one interpretation and could not be made plainer by explanation, the right to sue and be sued in every circuit court of the United States.

The words used in the charter of the defendant company, authorizing it to sue and be sued "in all courts of law and equity within the United States." do not so plainly confer jurisdiction upon the federal courts as those used in the charter of the second Bank of the United States, or so plainly omit to confer such jurisdiction as did those found in section 3 of the charter of the first Bank of the United States. They seem to us more nearly analogous to the words found in paragraph 9 of section 7 of the charter of the first Bank of the United States, which Chief Justice Marshall said expressly authorized suit in the federal or state courts.

The words of the charter of The Texas and Pacific Railway Company now under discussion are the same as those used by congress nine years before in incorporating The Union Pacific Railroad

Company (12 Stat. at L. 489), which company was empowered by section 1 of its charter "to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States."

In 1872 a citizen of Ohio sued The Union Pacific Railroad Company in the circuit court for Nebraska to recover damages for injuries received in the course of his employment as a brakeman for the defendant company. The company demurred to the complaint upon the ground that the court was without jurisdiction to hear it. Mr. Justice Miller, presiding, took the question under advisement and later handed down this short opinion.

> "The act of congress creating the defendant corporation (12 Stat. 490) contains this provision: 'The Union Pacific Railroad Company' by 'that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal,' etc., (section 1). I have examined the previous decisions of the Supreme Court of the United States supposed to have an important bearing on the question now presented, and, after reflection, am still of opinion that congress intended to make the defendant capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties. Demurrer overruled." Smith v. Union Pac. R. Co., 2 Dillon 278, 22 Fed. Cas. 694.

The reporter's note indicates that Mr. Justice Miller, in speaking of the previous decisions which he had examined, was referring to the Deveaux case in 5th Cranch, the Osborn case in 9th Wheaton and the Martin case in 5th Peters.

Three years later, in 1875, a citizen of Nebraska sued The Union Pacific Railroad Company in the circuit court for Nebraska, and the defendant company moved to dismiss the action for want of jurisdiction in the court. Mr. Justice Miller again presided, and disposed of the motion in the following opinion.

> "The petition alleges that the plaintiff is a citizen of the state of Nebraska, and that the defendant is a corporation created by and existing under the laws of the United States; and the question is whether it is suable in this court by a citizen of the state of Nebraska. Under the charter of the defendant company, I have heretofore held that it was suable in this court by a citizen of another state,—Smith v. Union Pac. R. Co.,—and I am of the opinion, on consideration of the provisions of the charter, that it may sue and be sued in this district, without reference to the citizenship of the adverse party." Bauman v. Union Pacific R. Co., 3 Dillon 367, 2 Fed. Cas. 1,043.

Ten years later, in 1885, Chief Justice Waite and Mr. Justice Miller dissented from the decision of the majority of the court in the Pacific Railroad Removal Cases, upon the ground that the broad interpretation given in the Osborn case to the constitution could not properly be given to the act of March 3, 1875, and the further ground that the charters of the defendant companies, though conferring original jurisdiction upon the federal courts, did not confer upon them jurisdiction by removal. The defendant companies were The Union Pacific Railroad Company in four cases and The Texas and Pacific Railway Company in three cases, the charters of the two companies being, as we have seen, identical in their relevant provisions.

Chief Justice Waite, speaking for himself and Mr. Justice Miller, said:

> "I do not doubt the power of congress to authorize suits by or against federal corporations to be brought in the courts of the United States. That was decided in Osborn's case, and with it I have no fault to find. *Neither do I doubt that congress did, in the charters under which these corporations exist, authorize suits by or against them to be brought in the courts of the United States as well as in the courts of the states;* * * * The acts of incorporation made no provision for the removal to the courts of the United States of suits begun in a state court." Pacific Railroad Removal Cases, 115 U. S. 1 (24).

After another period of twenty-four years, there came on to be heard in this Court the original suit of Mrs. Dunn for a writ of mandamus requiring a circuit court to remand to a state court an action therein begun against The Texas and Pacific Railway Company and two of its employés for damages for the negligent killing of the plaintiff's husband. In delivering the opinion of the Court Mr. Justice Peckham said:

> "If the question were as to the right to remove a case to the federal court where the sole defendant was a corporation created by an act of congress, there can be no dispute as to the right of such a defendant to claim the removal. As the corporation derives all its rights from the law of congress, a suit brought against it on account of its action arises under the constitution or laws of the United States. Osborn v. Bank of the United States, 9 Wheat. 738, 817, 828; Pacific Railroad Removal Cases, 115 U. S. 1. *See also act of incorporation of the Texas & Pacific Railroad Company,* 16 Stat., p. 573, c. 122, March 3,

> 1871, *giving the right to the corporation* (p. 574, §1) *to sue and be sued in all the courts of law and equity within the United States.*" Matter of Dunn, 212 U. S. 374 (383-4).

Mr. Justice Peckham's reference to the charter was not a mere dictum. One of the company's contentions in that case was that it was subject to the jurisdiction of the United States circuit court for the northern district of Texas because of the express grant of jurisdiction in section 1 of its charter. See brief of Judge Dillon and others in opposition to the application for mandamus, pp. 16 and 18-19.

Thus our interpretation of the words under discussion, which is natural and preferable in itself, is supported by two considered decisions of Mr. Justice Miller, by the above quoted emphatic statement of Chief Justice Waite and Mr. Justice Miller in the Pacific Railroad Removal Cases, and by Mr. Justice Peckham's citation of the charter in the Dunn case, with a lapse of thirty-seven years between the first decision and the last. We submit that this interpretation of the statute ought not now to be disturbed.

Second Proposition

The jurisdiction of this case expressly conferred by the act of March 3, 1871, has not been taken away by the act of January 28, 1915.

ACT OF 1915

The statute of 1915 relied upon by the defendant as withdrawing federal jurisdiction of its litigations, is section 5 of chapter 22, an act to amend the judicial code of 1911. The act contains no general repealing clause, and contains noth-

ing else relevant in any way to the contents of section 5, which is only three lines long, and reads as follows (38 Stat. at L. 804):

> "Sec. 5. No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of congress."

FIRST POINT

As a matter of practical fact, with which congress could deal as such, federal incorporation is a ground of federal jurisdiction.

Authorities

Magee v. Union Pac. R. Co., 2 Sawyer 447, 16 Fed. Cas. 390; Union Pac. R. Co. v. McComb, 1 Fed. 799; Texas & Pac. Ry. Co. v. McAllister, 59 Texas 349; Myers v. Union Pac. Ry. Co., 16 Fed. 292; Pacific Railroad Removal Cases, 115 U. S. 1; Leather Manufacturers' Bank v. Cooper, 120 U. S. 778; Petri v. Commercial Nat. Bank, 142 U. S. 644; Butler v. National Home for Soldiers, 144 U. S. 64; Wash. & Idaho R. Co. v. Coeur d'Alene Ry. & Nav. Co., 160 U. S. 77; Texas & Pac. Ry. Co. v. Cody, 166 U. S. 606; Continental Nat. Bank v. Buford, 191 U. S. 119; Texas & Pac. Ry. Co. v. Archibald, 170 U. S. 665; Texas & Pac. Ry. Co. v. Barrett, 166 U. S. 617; Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468; Charnock v. Texas & Pac. Ry. Co., 194 U. S. 432; Texas & Pac. Ry. Co. v. Dashiell, 198 U. S. 521; Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353; Texas & Pac. Ry. Co. v. Swearingen, 196 U. S. 51; Texas & Pac. Ry. Co. v. Watson, 190 U. S. 287; Texas & Pac. Ry. Co. v. Eastin & Knox, 214 U. S. 153; Texas & Pac. Ry.

Co. v. Howell, 224 U. S. 577; Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319; Texas & Pac. Ry. Co. v. Stewart, 228 U. S. 357; Texas & Pac. Ry. Co. v. Rosborough, 235 U S. 429; Texas & Pac. Ry. Co. v. Hill, 237 U. S. 208; Texas & Pac. Ry. Co. v. Bigger, 239 U. S. 330.

Argument

While from the beginning the judicial power of the United States has extended to all cases in law and equity arising under the constitution, laws or treaties of the United States, the clause of the constitution creating this power (art. 3, §2) is not self-acting, and the extent and manner of the exercise of such power by the inferior courts of the nation are entirely within the discretion of congress.

Except for the period of about one year while section 11 of the act of February 13, 1801 (2 Stat. at L. 89), was in force, we believe that congress never undertook to exercise this power in any broad and general way prior to its passage of the act of July 27, 1868 (15 Stat. at L. 226). By this act, which in substance was carried forward into the Revised Statutes of 1873 as section 640, and which in that form continued in force until its repeal in 1887, it was provided that a federal corporation other than a bank might remove to the appropriate federal court a suit at law or in equity brought against it in a state court, upon filing a verified petition therefor, stating that it had "a defense arising under or by virtue of the constitution of the United States, or any treaty or law of the United States", and giving bond. Evidently congress in 1868 discriminated between a real federal question, and those constructive federal questions which inhere in every suit by or against a company having a federal charter. The

act of March 3, 1875, as construed in 1885 in the Pacific Railroad Removal Cases, rendered section 640 of the Revised Statutes a dead letter, and it was repealed in 1887.

By the act of March 3, 1875 (18 Stat. at L. 470), which in this particular was not changed by the act of March 3, 1887 (24 Stat. at L. 552), the circuit courts were given jurisdiction "of all suits of a civil nature at common law or in equity" involving a prescribed amount, "and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

Under this statute there grew up a doctrine, which prior to 1915 had hardened into what was practically an independent rule of law so firmly established as not to be affected by the changes in phraseology found in the corresponding clause of section 24 of the judicial code of 1911,—a rule of law to the effect that there was immanent in every suit by or against a federally incorporated company a federal question of such character as to give jurisdiction to the federal courts. Under this rule a federal question always existed constructively in a suit by or against a company incorporated under an act of congress, regardless of the existence or non-existence as a matter of fact of any dispute involving the validity, interpretation or application of a law of the United States; and this constructive federal question gave jurisdiction to the federal courts.

In 1873 The Union Pacific Railroad Company undertook to remove a personal injury action from a state court to a United States circuit court under the provisions of the act of July 27, 1868, upon the ground that it was incorporated under an act of congress, and that inasmuch as it had a federal charter, by virtue of that fact alone it had a de-

fense arising under a law of the United States. The circuit court remanded the cause, since it appeared that the defense did not involve the construction of any law of the United States, and that a correct decision upon the merits depended entirely upon common law principles wholly independent of any statute law. Magee v. Union Pacific R. Co., 2 Sawyer 447, 16 Fed. Cas. 390.

In 1880 the Union Pacific Railroad Company sued McComb in a state court in New York for the recovery of moneys alleged to have been obtained by fraud. McComb removed the case to the circuit court for the southern district of New York upon the ground that the plaintiff was a corporation created by an act of congress and that the suit and the matters in dispute therein arose under the laws of the United States. The company moved to remand upon the ground that the matters in dispute in the suit in nowise concerned or were involved in, or were controlled by, any of the laws of the United States, except in so far as the same might be concerned by the fact that the plaintiff was incorporated by an act of congress. Upon these pleadings and the application thereto of the reasoning in the Osborn case Judge Blatchford held that the cause presented a federal question, and was removable under the act of March 3, 1875. The federal question involved of course was only the constructive federal question, inherent in the charter, and not any actual controversy whose determination depended upon the application of a law of the United States. Union Pacific R. Co. v. McComb, 1 Fed. 799.

In 1885 this Court decided together seven removal cases, four against Union Pacific Railway Company, and three against The Texas and Pacific Railway Company. Six of them were personal injury or wrongful death cases, and the seventh was

an appeal by the Union Pacific from an award of damages in its favor upon the condemnation of some of its property in Kansas City. There was no contention that any of these cases involved an actual federal question as distinguished from what we have called a constructive federal question. In some of the cases removal was sought under section 640 of the Revised Statutes, upon the theory that because the defendant was a federal corporation it necessarily had a defense arising under a law of the United States. This claim appears not to have been decided by this Court. In one of the cases a state court in Kansas refused to grant the petition for removal, and the writ of error was taken from a judgment of the supreme court of Kansas affirming the judgment of the court below. The three cases of The Texas and Pacific Railway Company all came from the supreme court of Texas, which in like manner had affirmed judgments of the courts below denying petitions for removal. Three of the cases against Union Pacific Railway Company came respectively from the circuit courts for the district of Kansas, the western district of Missouri and the district of Nebraska, all of which courts had held themselves without jurisdiction.

The understanding of the courts whose judgments were up for review, as to the nature of the question involved, may be indicated by quotations from two of the written opinions rendered. In the case of Texas & Pacific Ry. Co. v. McAllister, 59 Texas 349, wherein the company's reliance seems to have been placed upon article 640 of the Revised Statutes, the supreme court of Texas said (p. 361):

> "It is urged that a corporation chartered by act of the general government has in every case a defense under the statute incorporat-

ing it. If so, the fact that it was thus chartered is all that is necessary to be known to the court in order to entitle it to removal. Why, then, did the statute require the superfluous statement of the additional fact that the corporation had a defense under a United States law? And why did it require such fact to be sworn to, if the court was bound judicially to know it? These considerations, together with the authorities cited, lead us to the conclusion that the mere statement in an application for removal that the corporation chartered by United States law has a defense under its act of incorporation is insufficient, when neither the said act, nor any of the papers or proceedings in the cause show that such defense exists or can possibly arise upon the trial, and is not sufficient to entitle the applicant to a removal."

In another of the cases, Myers v. Union Pacific Ry. Co., 16 Fed. 292, in which case the company relied upon the act of March 3, 1875, Judge McCrary said:

> "In the present case the removal was sought upon the latter ground" (the existence of a federal question), "and it appears from the record that it is based upon the single alleged fact that the defendant is a corporation organized under the laws of the United States; from which fact the inference is sought to be drawn that the case of the plaintiff, being a suit to recover damages for personal injuries caused by the defendant's negligence, is a case arising under the laws of the United States. To this proposition I do not agree. The inference does not necessarily follow from the fact. The removal is sought on account of the character of the subject-matter of the suit, not because of the character of the parties. It is necessary that the record should show affirmatively that the

> cause of action or defense arises upon some construction of, or upon a claim of right arising under, some law of the United States, or of a treaty, or of some provision of the constitution of the United States. A suit against the defendant corporation is not necessarily a case which arises under a law of the United States within the meaning of the removal acts."

To the question thus presented and the statute raising the same, the majority of the Court, speaking through Mr. Justice Bradley, with Chief Justice Waite and Mr. Justice Miller dissenting, applied the reasoning which in the Osborn case Chief Justice Marshall had applied to the constitutional question there involved. As there was not in any one of the seven cases any real dispute determinable by reference to a law of congress, and as in each case the only federal question was the constructive federal question inhering in the fact that the company was chartered by act of congress, the decision of the court necessarily was a decision of the question whether a suit against a federally incorporated company was by virtue of that sole fact, or upon that sole ground, removable from the state court to the federal court. Accordingly, the decision of the Court was announced in these words by Mr. Justice Bradley.

> "We are of opinion that corporations of the United States, created by and organized under acts of congress, like the plaintiffs in error in these cases, are entitled as such to remove into the circuit court of the United States suits brought against them in the state courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits 'arising under the laws of the United States.' "

Of course, there was elaborate reasoning back of this decision. But the net result was that as a practical matter federal corporations were held to be entitled as such, and without showing anything more than the fact of federal incorporation, to remove their suits from the state courts to the federal courts, because there was always present a constructive federal question in such a suit, though no real federal question in fact existed. Pacific Railroad Removal Cases, 115 U. S. 1.

And so ever since the law has been held to be; and in such terms ever since courts, lawyers and congress usually have spoken of it.

In 1886, disregarding the provisions of the act of July 12, 1882, a national bank sought to remove from a state court to a federal court a suit brought against it to recover a balance on account, and in this Court Chief Justice Waite used the following language in stating the case, which was held to be not removable.

> "On the 23d of September, 1886, the bank presented its petition to the state court for the removal of the suit to the circuit court of the United States for the southern district of New York under the act of March 3, 1875, *on the ground of its being a national bank, and consequently the suit was one arising under the laws of the United States.* The cause was duly entered in the circuit court October 4, 1886, and, on the 9th of the same month, Cooper moved that it be remanded. This motion was granted October 22, because §4 of the act of July 12, 1882, had taken away from national banks the right of removing suits under the act of 1875 *on the ground of their being federal corporations.*" Leather Manufacturers' Bank v. Cooper, 120 U. S. 778.

In 1890 a national bank in Chicago filed in a United States circuit court in Texas a suit against a citizen of Texas for the recovery of a debt, the ground of federal jurisdiction being diversity of citizenship. It was claimed by the defendant that by the act of July 12, 1882, and the act of March 3, 1887, jurisdiction had been withdrawn from the federal courts in such cases. The circuit court retained jurisdiction, and rendered a judgment in favor of the plaintiff; and in announcing the affirmance thereof by this Court Chief Justice Fuller used language which seems to us illuminating as applied to the question now under consideration. He said (citations omitted):

> (Speaking of the state of the law before the act of 1882) "Suits by or against national banks might therefore be brought or removed upon the ground of diverse citizenship, or of subject matter, since as they were created by congress, and could acquire no right, make no contract and bring no suit, which was not authorized by a law of the United States, a suit by or against them was necessarily a suit arising under the laws of the United States. And of course national banks as well as state banks and individuals might bring or remove suits otherwise arising under the constitution, laws or treaties of the United States" (quotation from the act of July 12, 1882, omitted). "Hence the jurisdiction of the circuit courts over suits by or against national banks could no longer be asserted *on the ground of their federal origin*, as they were placed in the same category with banks not organized under the laws of the United States. *So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the circuit courts, that was taken away, but the jurisdiction which those courts might exercise in such suits when arising* be-

> tween citizens of different states or *under the constitution or laws of the United States, except in that respect, remained unchanged.*" Petri v. Commercial National Bank, 142 U. S. 644.

National Home for Disabled Volunteer Soldiers, a federal corporation, sued its former treasurer to recover an alleged shortage in his accounts,—an action which obviously involved no real federal question, but only the constructive federal question growing out of its incorporation under a law of the United States. The case was removed by the defendant to the federal court upon grounds thus stated by Mr. Justice Harlan in delivering the opinion of this Court upon appeal:

> "Upon the petition of the defendant the case was removed for trial into the circuit court of the United States *upon the ground that the plaintiff was a corporation created by an act of congress,* and the suit was, therefore, one arising under the laws of the United States." Butler v. National Home for Disabled Volunteer Soldiers, 144 U. S. 64.

In Washington & Idaho R. Co. v. Coeur d'Alene Ry. & Nav. Co., 160 U. S. 77, Northern Pacific Railroad Company, a federal corporation, was a nominal party as the tenant in possession of property in dispute, but no real federal question depended for its solution upon the application of any law of the United States. The case was removed to the federal court, and jurisdiction thereof was retained. As to this matter Mr. Justice Shiras, speaking for this Court, said (p. 93):

> "The circuit court of appeals maintained the jurisdiction of the circuit court, *on the ground that there was a federal question in-*

volved in the fact that the Northern Pacific Railroad Company, a corporation created by the laws of the United States, was a party to the action. We agree with that court in regarding such a fact as conferring jurisdiction on the circuit court."

Texas & Pacific Ry. Co. *v.* Cody, 166 U. S. 606, was a personal injury suit begun in a state court and removed by the defendant to a federal court. The plaintiff's petition alleged that the defendant was a private corporation created and existing under the laws of the state of Texas. The defendant's petition for removal alleged that it was a corporation incorporated under certain acts of congress, mentioning them, and that the suit was one arising under the laws of the United States within the meaning of the act of 1875, as amended by the acts of 1887 and 1888. This Court held that in these circumstances judicial cognizance would be taken of the fact that the defendant company was a federal corporation, and not a corporation existing under the laws of the state of Texas, and that by reason of that fact it was entitled to remove the cause in accordance with the decisions of this court in Pacific Railroad Removal Cases.

In Continental National Bank v. Buford, 191 U. S. 119, a national bank of Memphis sued citizens of Arkansas in the United States circuit court in Arkansas, to recover upon a cause of action created by statutes of Arkansas. This Court dismissed for want of jurisdiction a writ of error to the circuit court of appeals, because the jurisdiction of the circuit court was dependent solely upon diversity of citizenship. In delivering the opinion of this Court Mr. Justice Harlan said:

"No ground whatever of jurisdiction in the circuit court appears in the complaint or else-

where in the record, other than diversity in the citizenship of the parties, unless it can be said that *by reason alone of the plaintiff bank having been organized under an act of congress* the suit is one arising under the laws of the United States. This, however, could not be said of the present suit, if regard be had to the acts of congress defining and regulating the jurisdiction of the courts of the United States" (discussion of the acts of 1875, 1882, 1887 and 1888 omitted). "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States *simply upon the ground that they were created by and exercised their powers under acts of congress.* No other purpose can be imputed to congress than to effect that result. Of course, notwithstanding the acts of 1882 and 1888, there remained to a national bank, independently of its federal origin, and as a citizen of the state in which it was located, the right to invoke the original jurisdiction of the circuit courts in any suit involving the required amount, and which, *by reason of its subject matter, and not by reason simply of the federal origin of the bank,* was a suit arising under the constitution or laws of the United States. Treating the plaintiff as a citizen of Tennessee, its right to sue the defendant in the federal court, sitting in Arkansas, was beyond dispute. But, as already suggested, it did not assert any right, privilege or immunity that was dependent in any degree upon the constitution or laws of the United States. *As jurisdiction could not arise merely from the federal origin of the plaintiff bank, and as no federal question was involved in the suit,* it must be taken that

> the only ground of jurisdiction in the circuit court was diverse citizenship of the parties. *If, apart from the fact that the plaintiff bank was a federal corporation, the suit had been one arising under the constitution or laws of the United States*, it could not have been said that the jurisdiction of the circuit court depended entirely upon diverse citizenship of the parties."

In addition to the cases above cited, those below mentioned, dealing with the appellee in the case at bar, illustrate how completely established the doctrine has become that a federal charter gives federal jurisdiction.

Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, was a personal injury suit brought in a state court and removed to a federal court. Mr. Justice Harlan said:

> "It was brought in the circuit court of Dallas County, Texas, and was removed into the circuit court of the United States for the northern district of Texas on the petition of *the defendant, a corporation created under acts of congress.*"

Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, was a personal injury suit removed by the railway company from a state court to a federal court. The plaintiff's petition did not show that the company was incorporated by act of congress. The petition for removal probably did show it. Chief Justice Fuller said:

> "The petition for removal was sufficient, and *as the company was created by act of congress the circuit court properly entertained jurisdiction.*"

Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665, was a personal injury suit removed by the defendant from a state court to a federal court. Mr. Justice White said:

> "This suit, commenced in a state court, was removed to the circuit court of the United States for the eastern district of Texas, *on the ground that the defendant was incorporated under the laws of the United States.*"

Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, was a personal injury suit removed to a federal court by the defendant railway company. Mr. Justice Holmes said:

> "This is an action for personal injuries brought by an employé against a railroad company. It was tried in the circuit court, where the plaintiff had a verdict. It then was taken to the circuit court of appeals on a writ of error and bill of exceptions by the company, 112 Fed. Rep. 35, and now is brought here on a further writ of error, *the company being a United States corporation.*"

Charnock v. Texas & Pacific Ry. Co., 194 U. S. 432, was a suit for damages for the destruction of cotton by fire, of which Mr. Justice McKenna said:

> "The case was removed from the civil district court in and for the parish of Orleans to the United States circuit court for the eastern district of Louisiana by defendant, *on the ground that it was a corporation organized by an act of congress of the United States.*"

Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 51, was a personal injury suit removed by the defendant to the federal court upon the ground thus stated by Mr. Justice White:

> "This suit was commenced in a state court by W. W. Swearingen, the defendant in error, and, on the application of the defendant, the Texas & Pacific Railway Company, was removed to the circuit court of the United States as one arising under the laws of the United States, *because the railway company was chartered under an act of congress.*"

Texas & Pacific Ry. Co. v. Dashiell, 198 U. S. 521, was a personal injury suit removed by the defendant to the federal court, of which Mr. Justice McKenna said:

> "This action was originally brought in the district court of Tarrant County, in the state of Texas, and removed by the railway company to the United States circuit court for the northern district of Texas *on the ground that the railway company is a corporation under the law of the United States.*"

Texas & Pacific Ry. Co. v. Howell, 224 U. S. 577, was a personal injury suit of which Mr. Justice Holmes said:

> "The case was begun in the state court and was removed to the circuit court, and is brought here, *solely on the ground that the plaintiff in error has a charter from the United States. But for that accident, which has no bearing upon the questions raised, the case would stop with the circuit court of appeals.* Under such circumstances we go no further than to inquire whether plain error is made out."

Texas & Pacific Ry. Co. v. Harvey, 228 U. S. 319, was a wrongful death suit, removed by the defendant from a state court and of which Mr. Justice Day said:

> "This case comes to this court from the circuit court of appeals for the fifth circuit *because The Texas & Pacific Railway Company is a federal corporation.*"

Texas & Pacific Ry. Co. v. Stewart was a personal injury suit at page 357 of the same volume, removed from state court to federal, and of it Mr. Justice Day said:

> "Judgment upon verdict in the United States circuit court for the eastern district of Texas, to which the case had been removed, was affirmed by the United States circuit court of appeals for the fifth circuit. The case is brought here *because of the fact that the railway company was organized as a federal corporation.*"

Texas & Pacific Ry. Co. v. Rosborough, 235 U. S. 429, was an action for damages caused by a fire which resulted from escaping sparks. Mr. Justice McReynolds said of it:

> "This cause was removed from the state court to the district court and comes here *solely because plaintiff in error is incorporated under an act of congress.* We go no further than to inquire whether there is plain error."

Texas & Pacific Ry. Co. v. Hill, 237 U. S. 208, was a personal injury suit removed from a state court to a federal court, wherein the plaintiff recovered a judgment that was affirmed by the circuit court of appeals. The removal was had after the judicial code of 1911 took effect. In overruling a motion to dismiss a writ of error Mr. Chief Justice White said:

> "*As a corporation created by an act of congress this plaintiff in error is inherently enti-*

> *tled to invoke our jurisdiction.* Hence the motion to dismiss is without merit."

Texas & Pacific Ry. Co. v. Bigger, 239 U. S. 330, was a removed personal injury suit, wherein a judgment for the plaintiff was affirmed by the circuit court of appeals in a memorandum decision. It is the latest of the appellee's cases decided by this Court. There was a motion to dismiss, as to which Mr. Justice McKenna said shortly (p. 334):

> "The motion to dismiss is overruled. *The railway company is a federal corporation* and the questions raised are not frivolous. We pass, therefore, to the merits."

We think therefore that there is a large class of cases of which it is proper to say, and of which it long has been usual to say, that the federal courts have jurisdiction of them upon the ground that a company litigant was incorporated under an act of congress. This class is made up of the cases whereof the federal courts have jurisdiction only because there is involved constructively in every suit by or against a company chartered under act of congress a federal question growing out of the mere fact of federal incorporation, even though the provisions of the charter are in no wise brought into actual controversy. It does not include any case whereof the federal courts have jurisdiction by reason of the existence of an actual, as distinguished from a constructive, federal question, or by reason of an express grant of jurisdiction, or by reason of diversity of citizenship, or upon any other ground.

How important this class is, is indicated by the fact that it includes most of the cases which have reached this Court involving federally chartered

companies. We have been curious enough to look at 97 cases of The Texas and Pacific Railway Company reported in volumes 115 to 239 of the reports of this Court, beginning with the Pacific Railroad Removal Cases. Our examination has been hasty, and in many of the cases the report does not disclose the nature of the case, the ground of jurisdiction, or the court of origin. Therefore, the figures to follow are only approximately correct. In about 79 of the cases the railway company was the moving party here. About 34 of them were disposed of by this Court in memorandum decisions or orders, and of these about 17 were dismissed by the railway company. About 23 cases came from state courts. Of the other 74 about 24 were removal cases, about 10 were cases brought originally in federal courts, and as to the remainder we do not know. Apparently more than 70 per cent. were removal cases. About 32 of them were personal injury or wrongful death suits, about 10 were suits for damages to property, about 14 were miscellaneous suits, and as to the remainder we do not know. Apparently about two-thirds of the cases were damage suits. More than 50 of the cases came here from circuit courts of appeals since their organization in 1891, and in almost all of these the sole ground of jurisdiction here was the constructive federal question inherent in the federal charter. In about 33 of the 74 cases coming here from the lower federal courts, the only ground of federal jurisdiction was the constructive federal question inherent in the federal charter, in about 8 other grounds of jurisdiction appeared, and as to the remainder we do not know. Therefore it seems that in about 80 per cent. of the cases the one and only ground of jurisdiction

was the fact that the company was incorporated by act of congress.

SECOND POINT

A general act will not be held to repeal a provision of an earlier special act, unless the intention of congress to accomplish such repeal is unmistakably manifest.

Authorities

Dwarris on the Statutes (2nd ed.), 532; Sedgwick on Construction of Statutory Law (2nd ed.), 97; Maxwell on Interpretation of Statutes (5th ed.), 131, 285, 291; Beal's Rules of Legal Interpretation (2nd ed.), 463; Endlich on Interpretation of Statutes, §§ 223, 228-9; 1 Sutherland on Statutory Construction (2nd ed.), §§ 274-5; Black on the Interpretation of Laws (2nd ed.), 328; Broom's Legal Maxims (8th ed.), 19; Ex Parte Crow Dog, 109 U. S. 556; Rodgers v. United States, 185 U. S. 83; United States v. Nix, 189 U. S. 199.

Argument

The act of 1915 is a general act, which contains no repealing clause, which mentions no particular railroad, and which deals with a general situation having its origin in the mere fact of federal incorporation, and not in any specific provision of the charter of any railroad company. The express grant of jurisdiction relied upon by the plaintiff is found in a special act incorporating the defendant company, and whose provisions it

must be presumed were carefully considered by congress in 1871 with reference to this one company.

The general rule was thus stated by Mr. Justice Brewer in Rodgers v. United States, 185 U. S. 83 (87).

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

THIRD POINT

The history of the passage of section 5 of the act of January 28, 1915, through congress shows that congress intended to take away from the federal courts only their jurisdiction of the litigations of railroad companies resting upon the ground that such companies were incorporated under act of congress, or in other words only such jurisdiction as was dependent upon the existence of a constructive federal question arising from the mere fact of federal incorporation.

Preliminary

For the purpose of ascertaining the intent of congress it is proper to consider the development of the act itself, the reports of committees relative thereto, and other similarly definite and reliable indicia.

> Church of the Holy Trinity v. United States, 143 U. S. 457 (464); Binns v. United States, 194 U. S. 486 (495); United States v. Nakashima, 87 C. C. A. 646, 160 Fed. 842 (846); Symonds v. St. Louis & S. E. Ry. Co., 192 Fed. 353 (355-6).

It also is proper in interpreting a statute to consider the environment, the history of the times, and the particular evil which was pressing upon the attention of congress, and for which it was seeking a remedy. For this purpose the court may avail itself of all accessible sources of information, including the proceedings and debates in congress.

> Church of the Holy Trinity v. United States, 143 U. S. 457 (463-4); Standard Oil Co. v. United States, 221 U. S. 1 (50); United States v. Union Pacific R. Co., 91 U. S. 72 (79); Taylor v. United States, 81 C. C. A. 197, 152 Fed. 1 (4-5); Symonds v. St. Louis & S. E. Ry. Co., 192 Fed. 353 (355-6); Maxwell on the Interpretation of Statutes (5th ed.), 37; Black on the Interpretation of Laws (2nd ed.), §91.

Argument

The statute now embodied in section 5 of the act of January 28, 1915, was a house bill, which

passed the house originally without opposition in form as follows:

> "That an action or suit by or against a railroad company incorporated and existing under an act of congress shall not be regarded as a case arising under a law of the United States within the meaning of the statutes regulating the jurisdiction of the courts of the United States, unless there be some sufficient reason for so regarding it independently of the incorporation and existence of the railroad company under an act of congress." 52 Congressional Record 282 and 283.

In the house Mr. Floyd, in behalf of the judiciary committee, explained the bill as follows:

> "The courts have held that a railroad company chartered by congress has a right to remove a cause to the federal courts on the sole ground that it is a corporation authorized by congress. This bill was introduced by the gentleman from Texas (Mr. Beall), and the Texas Pacific road, operating in Texas, was incorporated by act of congress, and is the only road in the state of Texas that has the right to transfer its cases to the federal court on the ground that it was incorporated by congress, thereby giving it an advantage over other railroad corporations operating in the state of Texas. This amendment provides that if a railroad company chartered by act of congress takes its cases to the federal court it must allege some other ground provided by statute for the transfer of cases from the state to federal courts. In other words, it so amends the law that they cannot take it to the federal courts on the sole ground that the corporation was chartered by congress." 52 Congressional Record 283.

By amendment proposed by the judiciary committee of the senate, the section was given its present form, and in explaining this change in behalf of the committee Senator Chilton said:

> "The amendment was proposed, and while it occurs to me that the language of the house bill and that of the amendment mean the same thing, the amendment was unanimously agreed to by the judiciary committee. * * * As I said before, that is simply changing the language of the section as it passed the house. The senate committee thought that the language of the amendment is a better way to express the purpose intended." 52 Congressional Record 1544.

From these proceedings it seems to us perfectly obvious that the evil at which congress was aiming was the defendant company's practice of transferring its cases from the state courts to the federal courts "on the ground that it was incorporated by congress". Evidently the house understood that it merely was so amending the law that such a company could not take its cases "to the federal courts on the sole ground that the corporation was chartered by congress". And so, as the house passed the bill originally, it provided only that a suit by or against a federally chartered railroad company should not be deemed one arising under a law of the United States unless there was some reason for so regarding it independently of the incorporation of the company under an act of congress. It is equally clear that the senate committee meant not to make any very material change in the scope of the bill, but to accomplish in a better way the same purpose which the house committee had sought to accomplish.

It is plain that the two judiciary committees, and the two houses which acted upon the reports of the committees without opposition, did not intend to take away jurisdiction in cases by or against railroad companies when there was sufficient reason for regarding such cases as arising under a law of the United States independently of the mere fact that the litigant company was incorporated under an act of congress. They did mean to take away all jurisdiction dependent upon the constructive existence of a federal question growing out of the sole fact of federal incorporation without more.

FOURTH POINT

If the act of 1915 be given the construction for which we contend it will accomplish the purpose of congress.

Four times in the course of his short statement to the house in behalf of the judiciary committee, Mr. Floyd mentioned the removal of causes from the state courts to the federal courts upon the ground of federal incorporation, and he mentioned no other evil to be cured, and no object to be gained by the proposed legislation other than the curing of this particular evil.

The right of removing causes from the state courts to the federal is now regulated by section 28 of the judicial code of 1911, which code constitutes a "title", styled "the judiciary", ready for insertion in a new compilation of the Revised Statutes. This section provides:

> "Any suit of a civil nature, at law or in equity, arising under the constitution or laws

> of the United States, or treaties made, or which shall be made, under their authority, *of which the district courts of the United States are given original jurisdiction by this title,* which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, *of which the district courts of the United States are given jurisdiction by this title,* and which are (sic) now pending or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non residents of that state."

Original jurisdiction, so far as conferred by the judicial code is conferred by section 24. The jurisdiction for whose exercise we now are contending was conferred by the act of March 3, 1871, and not by the judicial code. Therefore, section 28 of the judicial code, which limits jurisdiction by removal to cases whereof original jurisdiction is given to the federal courts "by this title", does not confer upon the federal courts jurisdiction by removal in those cases of which original jurisdiction is dependent upon the express grant contained in the act of March 3, 1871.

It follows that if the act of 1915 be construed in accordance with our contention, congress will have accomplished that which it sought to do. It will have relieved this Court from the burden of cases brought here by writ of error from the circuit courts of appeals upon the ground that the jurisdiction of the district court was not dependent solely upon diversity of citizenship. It will

have relieved the district courts and circuit courts of appeals of the numerous damage suits removed from the state courts upon the ground that the company was incorporated under act of congress. It will have taken away entirely the possibility of federally chartered railroad companies dragging into the federal courts by removal upon the ground of a federal question unwilling plaintiffs who preferred to sue in another jurisdiction, except in those cases wherein a real as distinguished from a constructive federal question is involved.

2

JURISDICTION BY REASON OF FEDERAL QUESTION

Specifications of Error

1. The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

3. The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the amount in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution or laws of the United States.

First Proposition

There exist in this case federal questions which give rise to federal jurisdiction, unless federal jurisdiction has been taken away by the act of 1915.

STATEMENT

By the act of March 3, 1871 (16 Stat. at L. 573), congress incorporated Texas Pacific Railroad Company. Sections 11 and 14 contained detailed provisions authorizing and regulating the borrowing of money by the company upon mortgage security.

By the act of May 2, 1872 (17 Stat. at L. 59), it was provided that Texas Pacific Railroad Company thereafter should be called The Texas and Pacific Railway Company, and by sections 2 and 3 other details were added to the regulation of the company's borrowing upon mortgage of its property.

The acts of 1871 and 1872 were again supplemented by the act of March 3, 1873 (17 Stat. at L. 598), consisting of one section which still further regulated the company's bonds and mortgages.

And finally the act of June 22, 1874 (18 Stat. at L. 197), was passed, comprising only one section, which was devoted to further regulation of the mortgaging by the company of its property as security for its bonds.

All the acts subsequent to that of 1871 purported to be merely supplementary to, and not amendatory of, the preceding act or acts; and those of 1873 and 1874 were in no sense acts of incorporation.

These statutory provisions are very elaborate. They occupy about three pages of the record (Tr.,

3-7, fols. 9-21), being set forth at large in the amended bill. The terms of the bonds and mortgage also are fully set forth in the bill. Hence any question of the inconsistency of any provision of the bonds or mortgage with any provision of the statutes properly may be said to appear on the face of the amended bill, and to be capable of determination under a motion to strike.

The amended answer of defendant The Texas and Pacific Railway Company has been included in the transcript, not for the purpose of attempting to bring into the case by means thereof any federal questions not imported by the amended bill, but for the purpose of illustrating the fact that some of the federal questions raised upon the bill are actually subjects of dispute.

FIRST POINT

This case involves real and not merely constructive federal questions.

Argument

As above indicated, the provisions of the four acts of congress authorizing and regulating the issue by The Texas and Pacific Railway Company of mortgages upon its property enter into minute details; and every contested provision of the mortgage in suit must be shown to square with these provisions, or with inferences necessarily deducible therefrom, in order that the plaintiff may be entitled to its enforcement. On the other hand there may be clauses of the mortgage which the plaintiff will be entitled to have disregarded be-

cause in conflict with provisions of the acts of congress, or to have held modified by such acts, or to have construed in such a way as to avoid conflict with such acts.

There is in the mortgage in suit (Tr., 71) a clause providing that "there shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage." This suit is brought in part for the foreclosure of the second mortgage because of default in the payment of interest, and it is not alleged that the first mortgage is under foreclosure or that there exists any default entitling the holders thereof to foreclosure. The answer (Tr., 133; marg. p. 154) sets up this clause in bar of the suit. Obviously, it must be the contention of the plaintiff that this clause either is invalid as applied to the present suit, or is to be so construed as not to be applicable to the present suit. Whether the clause is so invalid or should be so construed, is a question which must be solved in the light of and by the application of the expressed and implied provisions of the four acts of congress regulating the company's issuance of mortgages, as well as in the light of and by the application of the general rules of law.

The mortgage in suit contains also a very elaborate provision (Tr., 69-71) to the effect that the trustee may take possession of the mortgaged property and administer it, in case of the occurrence of default in the payment of interest at the full contract rate of five per cent per annum. This clause forms in part the basis for the relief sought by bill. In the answer (Tr., 138; marg. p. 160) the defendant says "that both public policy

and the law requires (sic) that said property should be administered by the officers and board of directors of this defendant, other than a committee appointed by the trustee under the second mortgage or by the bondholders secured by said second mortgage". Whether and to what extent this provision is valid, must depend largely upon the solution of the question whether and to what extent the performance of the public duties assumed by the railway company when it accepted its charter and the acts supplementary to its charter can be delegated temporarily through the mortgage to a trustee or to the bondholders; and the solution of this question in turn involves the construction and application of the acts of congress.

Again, the answer denies (Tr., 106; marg. p. 116) that property acquired by the company subsequently to the execution of the mortgage is subject to the lien thereof. The plaintiff alleges that such property is subject to its lien, and that it is entitled to an accounting thereof, and the mortgage set forth in the bill as an exhibit purports to cover after-acquired property (Tr., 20 and 61). Whether by virtue of the mortgage the plaintiff has a lien upon property acquired after the execution of the mortgage is a question which involves the power of the mortgagor to include in its mortgage a provision that the same shall cover after-acquired property, and, therefore, the examination and interpretation and application of the statutes from which it derives all its power.

The bill avers that the plaintiff has a mortgage, and by virtue thereof an enforcible lien, upon the defendant's property, and it sets forth both the mortgage and the statutes whereby the plaintiff contends that the company was empowered to

grant the lien afforded by the mortgage. Necessarily this averment raises an issue to be determined in part at least by comparing the mortgage with the statutes. That this issue is not merely potential is indicated by the unexplained allegation in paragraph 37 of the answer (Tr., 126) "that complainant has no legal or equitable lien upon any of defendant's property which it is entitled to enforce in this or any other court".

All these questions are raised by the bill and not for the first time by the answer. We have referred to the contents of the answer only to illustrate the fact that there are questions involving actually, and not merely potentially, the construction and application of the acts of congress which control the conduct of the defendant company.

SECOND POINT

A suit to enforce a railroad mortgage given by a federally chartered company necessarily involves one or more federal questions that are not merely constructive in their character.

Argument

A railroad company has only such power to mortgage its property essential to the performance of its public duties as its charter and other governing laws confer expressly or by necessary implication.

> Jones on Corporate Bonds and Mortgages, Secs. 1-4 and cases cited; Baldwin on American Railroad Law, 463; Commonwealth v. Smith, 10 Allen, 448.

Authority for each provision relied upon by the plaintiff in a suit to enforce a railway mortgage, either shown by express averment or judicially noticed by the court, is an essential element of the plaintiff's bill.

> Frye v. Bank of Illinois, 5 Gilman (10 Ill.) 332; International & Great Northern R. Co. v. Underwood, 67 Texas 589; East Line & Red River Ry. Co. v. Rushing, 69 Texas 307.

A question determinable by the interpretation and application of an act of congress is a federal question.

> Ames v. Kansas, 111 U. S. 449; Howard v. United States, 184 U. S. 676; Cummings v. City of Chicago, 188 U. S. 410; Male v. Atchison, T. & S. F. Ry. Co., 240 U. S.——; Oregon v. Three Sisters Irrigation Co., 158 Fed. 346; Bowers v. First National Bank, 190 Fed. 676; McGoon v. Northern Pacific Ry. Co., 204 Fed. 998.

All of the cases last above cited, except the McGoon case, are cases like the one at bar in which the litigation grew out of a contract made by authority of an act of congress.

It is not essential to the existence of federal jurisdiction by reason of the presence of a federal question that the litigation finally turn upon such question. This point, of course, is sustained by the entire line of cases, beginning with the Pacific Railroad Removal Cases, 115 U. S. 1, wherein it has been held that federal questions giving rise to fed-

eral jurisdiction are constructively present in every suit by or against a federally chartered company. But our present meaning is better illustrated by two recent cases.

In the Metropolitan Railway Receivership case, 208 U. S. 90, it was held that there existed a controversy for jurisdictional purposes in a suit for receivership of a railway, notwithstanding the defendant admitted all the allegations of the bill and consented to the appointment of a receiver. There was in that case no dispute of any kind, using the word dispute in its ordinary sense; but there was what Mr. Justice Peckham called a "justiciable claim" which had not been satisfied, and for the enforcement of which the machinery of the courts was called into action. In this sense there existed a jurisdictional controversy.

In Male v. Atchison, T. & S. F. Ry. Co., 240 U. S. ——, the plaintiff sought to hold the defendant liable on bonds issued by another company of which it was said that it was practically out of existence, and had not been and could not be served with process, but which had been incorporated by act of congress. It did not appear that there was any question as to the validity of the bonds as against the federal corporation which issued them; and that corporation, though named as a defendant in the bill, really was not a party to the suit. Yet it was held that a federal question, carrying with it federal jurisdiction, necessarily inhered in the fact that judgment was sought on bonds issued by the federal corporation.

See also Walker v. Windsor Nat. Bank, 5 C. C. A. 421, 56 Fed. 76, and Huff v. Union Nat. Bank, 173 Fed. 333, of both of which we shall have more to say later.

Second Proposition

The act of January 28, 1915, does not deprive the federal courts of their jurisdiction of this case arising out of the federal questions therein involved.

FIRST POINT

The jurisdiction taken away from the federal courts by the act of January 28, 1915, is only that jurisdiction which exists by reason of the constructive presence of a federal question arising out of the mere fact that the company litigant was incorporated under an act of congress.

Argument

We do not wish to add much here to the general discussion of the effect of the act of 1915 in connection with the second proposition of the argument on the existence of jurisdiction by express grant.

Congress has taken away from the federal courts their jurisdiction of the litigations of national banks resting upon the sole ground that such banks are organized under an act of congress, by acts which differ widely in form from the act of January 28, 1915, but to which this court has attributed in this respect the same net result that is literally expressed in the act of 1915.

> Leather Manufacturers' Bank v. Cooper, 120 U. S. 778; Petri v. Commercial Nat. Bank, 142 U. S. 644; Continental Nat. Bank v. Buford, 191 U. S. 119. See pp. 22-27, supra.

Bowers v. First Nat. Bank, 190 Fed. 676, was a suit by one of the parties to an escrow agreement against a national bank which was the escrow-holder, to recover damages from the bank for an alleged violation of its agreement in the premises. The complaint alleged that the defendant was a national banking association. The defendant removed the case from the state court in which it was instituted to a federal court, upon the ground that it involved a federal question. The plaintiff moved to remand. In the consideration of that motion the defendant urged, and the court held: (1) that by alleging that the defendant was a national banking association, the plaintiff, in substance, had included in his complaint all the provisions of the national banking act; and (2) that therefore the question whether a national bank had power under the provisions of the national banking act by virtue of which it was incorporated to bind itself as an escrow-holder was raised by the complaint; and (3) that it was such a federal question as gave jurisdiction over the cause to the proper federal court. Jurisdiction growing out of the mere fact that the bank was incorporated under an act of congress had been taken away from the federal courts by other acts of congress, but jurisdiction to determine a real question whether the bank had power under its charter to make a contract which the complaint alleged that it had made had not been taken away.

Walker *v.* Windsor Nat. Bank, 5 C. C. A. 421, 56 Fed. 76, was a suit on the official bond of the cashier of a national bank, which fact was held by the circuit court of appeals for the first circuit to import a federal question giving federal jurisdiction, although the acts of 1882 and 1888 had taken away such jurisdiction as rested upon

the sole ground of federal incorporation. In that connection Judge Putnam said:

> "The bond in the case at bar was conditioned, not only for the faithful execution of the office of cashier by the principal in it, but also that he would perform the duties thereof, 'according to law, and the by-laws' of the bank. Even without the express use of the words quoted the condition of the bond of a cashier of a national banking association, providing in terms only for the faithful performance of the duties of his office, or of any bond given as contemplated by section 5136, Rev. St., would inevitably imply the further condition that the cashier should regard all the provisions of law looking to the protection of the association from loss, or to the accomplishing its successful, safe, and profitable operation. Such provisions are found mainly in the Revised Statutes, or are at least so extensively embodied in them, and originated by them, that any attempt to read correctly a bond of the class in suit must lead at once, and directly, to their examination, and must find very largely, if not in the main, its support in their injunctions."

What, if any, contested question determinable by reference to the national banking act was raised in this case does not appear from the report. But there, as in the case at bar, the suit was one to enforce a contract whose foundation was an act of congress, and whose effect depended upon such act even though no contest over the meaning or application thereof might develop in the course of the litigation.

In Huff v. Union Nat. Bank, 173 Fed. 333, a suit by stockholders of a national bank to recover from its officers in its behalf moneys lost to it through excessive loans was held to present a jurisdictional federal question arising upon the face of the bill. Judge Van Fleet said:

"Obviously it seems to me that in such a case the suit must be held to be one arising under a law of the United States, because the right to recover, if it exists, is thus directly given by an act of congress, and the court is bound, therefore, in determining the controversy to decide whether or not the act gives the right claimed under it. Nor is this view to my mind at variance with the contention of the defendants, based upon the language of some of the cases, that it must appear from the averments of the bill that the construction of a federal statute is necessarily involved; for, in order to determine whether or not the act relied on does give the right claimed, the court is necessarily required to construe the act. That that question of construction is a matter in actual controversy sufficiently appears from a pleading which, like the present bill, merely alleges the violation of the statute, the fact of the injury resulting from such violation, and the fact that compensation has not been made for that injury. Such controversy exists because, if the complainants' construction of the law be correct, the defendants ought to have made good the loss resulting from their wrongful acts; and their failure to do so is in itself a denial of the correctness of that construction. * * * * The idea that the bill should allege that the defendants actually dispute the construction of the statute claimed by the complainants is not, so far as I have been able to discover, supported by any of the cases upon the subject. To the contrary, it is now firmly settled that the existence of a federal question must appear from the complainant's statement of his own case, and cannot be aided by any allegation as to what the defendant claims or contends in that regard".

It seems to us also that the statutory power to mortgage property needed for the perform-

ance of the public duties of a railway company, even when conferred by its charter, is a power quite distinct in nature from the power to be a corporation; and that those portions of the act conferring it are to be construed as independent legislation and not as parcel of the creative, incorporating law. Such statutory power necessarily includes both the corporate capacity and the legislative permission to make a conveyance otherwise against public policy. Therefore, such permission should not be deemed within the purview of an act like that of 1915.

SECOND POINT

The validity and effect of the various provisions of the mortgage must be determined with reference to the acts of 1873 and 1874, which are not acts of incorporation.

Argument

As above indicated, these acts are purely regulative in their character, dealing with the company as a corporation already existing, and upon their face appearing to be only supplementary to the previous acts. Full compliance with these regulations is essential to the complete validity of the bonds and mortgage. To determine whether there has been such compliance requires the interpretation of the acts and of the bonds and mortgage, and thus involves the solution of a federal question in no way dependent upon the fact that the company was incorporated under an act of congress. Surely congress did not intend to deprive the federal courts of their power to construe and enforce national laws regulating national corporations and enacted after their creation.

JURISDICTION BY REASON OF DIVERSITY OF CITIZENSHIP

Specifications of Error

1. The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

4. The court erred in holding that it had not jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states.

First Proposition

The court has jurisdiction of this cause on the ground of diversity of citizenship.

FIRST POINT

The diversity of citizenship is sufficiently shown by the record.

Argument

The amended bill, duly verified, alleges (Tr., 1-2, fol. 3) that the plaintiff is a corporation duly

organized and existing under and by virtue of the laws of the state of New York; that (Tr., 2, fol. 6) the defendant New Orleans Pacific Railway Company is a corporation duly organized and existing under and by virtue of the laws of the state of Louisiana; that (Tr., 2, fol. 5) the defendant The Texas and Pacific Railway Company is a corporation duly created by and existing under the laws of the United States of America, and has its principal place of business and its principal operating and general offices in the city of Dallas, in the state of Texas, in the Dallas division of the northern district of Texas, and that a material and substantial part of the railroads owned and operated by it, to wit, over 400 miles thereof, are located in said northern district of Texas, and that said defendant is a resident and inhabitant of said Dallas division of said northern district of Texas. It is further alleged (Tr., 12, fols. 43-44) that the said defendant now owns and operates approximately 1,039 miles of railroad in the state of Texas, approximately 779 miles of railroad in the state of Louisiana, and approximately 32 miles of railroad in the state of Arkansas.

The act of congress approved March 3, 1871, incorporating said defendant, The Texas and Pacific Railway Company, of which this court takes judicial notice, provides by section 1 thereof that said defendant is authorized and empowered to lay out, locate, construct, maintain, furnish and enjoy a continuous railroad and telegraph line from a point at or near Marshall, Texas, to ship's channel in the Bay of San Diego, California; and a supplementary act of congress of May 2, 1872, confers authority upon said defendant to construct, maintain, control and operate a road between Marshall, Texas, and Shreveport, Louis-

iana. The mortgage in suit, a copy of which is made a part of the bill, recites (Tr., 50) that the defendant is a corporation created by and existing under the laws of the United States of America and of the states of Louisiana and Texas.

If the contention of appellant, that these facts make said defendant a citizen of Texas for purposes of federal jurisdiction, is sound, the absence of a direct averment that it is a citizen of Texas is immaterial, since all the facts are alleged from which citizenship appears as the necessary legal intendment.

> Sun Printing & Publishing Assn. v. Edwards (1904), 194 U. S. 377; Marshall v. Baltimore & Ohio R. R. Co. (1853), 16 How. 314; Baltimore & O. S. W. R. Co. v. Davis (C. C. A. 7th Cir. 1906), 149 Fed. 191; Mathieson Alkali Works v. Mathieson (C. C. A. 4th Cir. 1906), 150 Fed. 241.

SECOND POINT

The facts above stated with reference to the defendant The Texas and Pacific Railway Company constitute it a citizen of Texas for purposes of jurisdiction of the federal courts in this cause.

Argument

The doctrine that for purposes of federal jurisdiction a state corporation is a citizen of the state which created it, had its inception in a case involving not a state, but a federal corporation. The status of a corporation for federal jurisdictional purposes was expounded by the Supreme Court for the first time in Bank of United States v. Deveaux et al. (1809), 5 Cranch 61. This was

a suit by the first Bank of the United States, a federal corporation, against citizens of the state of Georgia. The court held that a corporation could not, as such, be a citizen, but went behind the shell of the corporation and founded jurisdiction upon the ground that the controversy was between the corporators, citizens of the state of Pennsylvania, and the defendants, citizens of the state of Georgia. The same doctrine was applied to the case of a state corporation in Hope Insurance Co. v. Boardman (1809), 5 Cranch 57, which was argued and decided simultaneously with the Deveaux case.

Before the decision in the Deveaux case, the Supreme Court had held in the case of Strawbridge v. Curtiss, 3 Cranch 267, that where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support jurisdiction. For almost half a century after the decision in the Deveaux case, the courts applied the doctrine in the Strawbridge case and the Deveaux case to suits in federal courts by or against corporations and insisted upon the requirement that all the corporators must be citizens of different states from all of the parties on the other side.

In Louisville, etc. R. R. Co. v. Letson (1844), 2 How. 497, the Supreme Court finally modified this doctrine and established the conclusive presumption of citizenship, which has never since been departed from. What the court decided in this case cannot be better expressed than in the language used by Chief Judge Taney, in Covington Drawbridge Co. v. Shepherd (1857), 20 How. 227 (233):

> "The question as to the jurisdiction of the courts of the United States in cases

where a corporation is a party, was argued and considered in this Court, for the first time, in the cases of the Hope Insurance Company v. Boardman, and of the Bank of the United States v. Deveaux, 5 Cr., 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last-mentioned case, the Court held that in a suit by or against a corporation, in its corporate name, this Court might look beyond the mere legal being which the charter created, and regard it as a suit by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact), would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment.

But in the case of the Louisville, Cincinnati, and Charleston Railroad Company v. Letson, the Court overruled so much of this opinion as authorized a corporation to plead in abatement, that one or more of the corporators, plaintiffs or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it. And that, inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same pur-

> poses, be also regarded as citizens of the state from which this legal being derived its existence, and its faculties and powers."

And to use the language of Mr. Justice Gray, in Shaw v. Quincy Mining Company (1891), 145 U. S. 444, at page 451,

> "And it has ever since been treated as settled that for these purposes the members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled."

It is to be noted that this doctrine originated at a time when corporate activities were usually confined to the limits of the state of creation, and rests upon the theory that the citizenship of a corporation is that of the state for which it is chartered to do business and in which it has its habitat and domicile. In such state it operates by virtue of the authority conferred by the charter and has its legal home.

It is apparent that there is nothing peculiar in the nature of the sovereign body creating the corporation which makes this doctrine inapplicable to the case of a federally chartered corporation. The Texas and Pacific Railway Company, for example, has been created by competent authority to transact railroad business in the state of Texas, and has its habitat and domicile in that state. It may, therefore, as properly be presumed to be a citizen of Texas as if it had been created by the laws of that state. It is true that by virtue of its incorporation under the laws of the United States it is a citizen of the United States, but there is no reason why a corporation should not have a dual citizenship as well as a natural person.

That the doctrine of citizenship for jurisdictional purposes is not as firmly established in case of federal corporations arises from the fact that there has been practically no occasion for the application of such doctrine. Practically all federal corporations, except such as were chartered to operate in the District of Columbia or in territories, in existence prior to 1875, were able to sue or to be sued in the federal courts by reason of an express grant of jurisdiction contained in their charters.

Since the judiciary act of 1875, and prior to the act of January 28, 1915, all federal corporations, with the exception of national banks since 1882, have been able to sue and to be sued in the federal courts on account of their federal origin. In the case of national banks, congress expressly provides that the federal courts shall have the same jurisdiction as in respect of banks organized under state laws.

The act of 1864, providing for the incorporation of national banks, did not contain any general provision equivalent to the express grant of jurisdiction in former national bank charters. It did provide that suit might be brought in the federal court *against* a bank organized under this act in the district in which the bank was established. In respect of suits instituted by such a bank against a citizen of a state other than the one in which the bank was located, the question whether the federal courts had jurisdiction on the ground of diversity of citizenship, was presented and passed upon by the circuit courts in a number of cases. In every one of these cases which we have been able to find the court reached the conclusion that the fiction of citizenship in

the case of a state corporation was equally applicable to federal corporations, and that national banks must be regarded for purposes of federal jurisdiction, as citizens of the respective states in which they were domiciled.

Thus in St. Louis National Bank v. Allen (Circ. Ct. D. Ia., 1881), 5 Fed. 551, which was a suit by a national bank organized under the act of 1864, and located in St. Louis, Mo., against a citizen of Iowa, the court held that for purposes of federal jurisdiction the bank must be regarded as a citizen of Missouri. After examining the basis and development of the rule that for purposes of federal jurisdiction a state corporation is a citizen of the state under whose laws it was incorporated, the court, McCrary, J., on page 553, reached the conclusion that the same rule should apply to federal corporations:

> "*It is clear that a corporation acquires no attribute of citizenship by being organized under, or created by, a state law that it would not possess if created by a law of the United States.* The difficulties in the way of permitting corporations to sue in the federal courts on the ground of citizenship, apply with the same force whether a corporation derives its existence from a state or national law. The difficulties have been overcome, with respect to state corporations, by adopting an arbitrary presumption as to citizenship of the stockholders—a presumption, no doubt, often contrary to the fact, but justified in the opinion of the supreme court, by considerations of great public importance. *These considerations apply alike to all corporations located and doing business within a state, whether chartered under state or federal authority.* The policy of the adjudications referred to is to treat corporations as citizens of the

> state in which they are located; the circumstance that they derive their existence from a state law makes no difference. If they are created by an act of congress, and located within a state, they become, within the reason of the rule, citizens of the state as much as state corporations."

In Manufacturers National Bank v. Baack (Cir. Ct. S. D. N. Y. 1871), 16 Fed. Cas. 671, 8 Blatchf. 137, Judge Blatchford, in an exhaustive opinion, reached the same conclusion. After stating the rule as to state corporations, he said, 16 Fed. Cas. p. 672:

> "This rule, however, does not *ex vi termini* cover the case of a corporation created by an act of congress.
>
> "The argument urged against jurisdiction in this case, drawn from citizenship, is that, as the corporation is created by the United States, the only legal presumption that can be drawn is that its members are citizens of the United States; and that there is no presumption that they are citizens of the state in which the corporation is located. * * *
>
> "The members of a corporation created by the United States, and located in a particular state, in the manner and to the extent in which national banking associations are located in particular states, may as properly be presumed to be citizens of the United States and residents in the state where the corporation is located, so as thereby to be citizens of such state, as the members of corporations created by a state may be presumed to be citizens of the United States, and residents in the state creating it, and in which it is located, and, therefore, citizens of such state."

In Orange Nat. Bank v. Traver (Cir. Ct. D. Ore. 1881), 7 Fed. 146 (148), the court said:

> "It has been finally settled that a suit in a national court by or against a corporation, for the purpose of jurisdiction is to be conclusively presumed to be a suit by or against citizens of the state under whose laws such corporation was formed; and therefore it is deemed a citizen of the state which created it. O. & M. Ry. Co. v. Wheeler, 1 Black 295; Cowes v. Mercer Co., 7 Wall. 121. Strictly speaking, the plaintiff is a citizen of the United States but not of any state. Still, the plaintiff, although organized under a law of the United States, is by such organization and law located in the state of Massachusetts, and *by a parity of reasoning its stockholders may be presumed to be citizens of said state, and the corporation be entitled to sue and be sued as a citizen of Massachusetts.*"

National Park Bank v. Nichols (Cir. Ct. N. D. Ill. 1869), 2 Biss. 146, 17 Fed. Cas. 1,224; Main v. Second Nat. Bank (Dist. Ct. W. D. Wis. 1874), 6 Biss. 26, 16 Fed. Cas. 509.

Of course, the contention that a federal railroad corporation is a citizen of any state has rarely been raised because jurisdiction in suits by or against such a corporation could, from 1875 to January 28, 1915, always be predicated on the ground of federal incorporation. It is a matter of common knowledge, however, that in a large number of suits against the Union Pacific and Northern Pacific Railroads jurisdiction was actually invoked and taken upon the ground of diversity of citizenship.

Thus in Union Pacific Railway Company v. Harris (1895), 158 U. S. 326, which was a suit by a citizen of Colorado in the circuit court of Colorado against the Union Pacific Railway Company

for personal injuries, the complaint alleged that the defendant "is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the city of Omaha and state of Nebraska, and is now and was at the time and times hereinafter stated, a citizen of the state of Nebraska." Judgment was recovered against the defendant and affirmed by the circuit court of appeals. Defendant sued out a writ of error to the Supreme Court. The case came up on a motion to dismiss or affirm under subdivision 5 of rule 6. The contention of the defendant in error in making the motion to dismiss was, that the Supreme Court had no jurisdiction because jurisdiction below depended entirely upon diversity of citizenship, and therefore the decision of the circuit court of appeals was final. The motion to affirm was made upon the theory that there was at least color of ground for dismissal, and that therefore affirmance should follow if it be manifest that the writ was taken for delay only. Plaintiff in error, in resistance to the motion to dismiss, urged that jurisdiction was not dependent entirely upon the opposite parties being citizens of different states but rested in addition on the fact that the defendant was a federal corporation, and in opposition to the motion to affirm, stated that there was no color of ground for dismissal since the allegation of diverse citizenship was frivolous and utterly insignificant. The Court held that since the defendant was a federal corporation, jurisdiction was not based entirely upon diversity of citizenship, and therefore the motion to dismiss should be denied, but held further that there was color for the motion to dismiss and entertained the motion to

affirm and affirmed the judgment below. On page 327 the Court, Chief Justice Fuller speaking, said:

> "In the present case, jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further, that as the case did not involve the validity or construction of the charter of plaintiff in error, no federal question arose. It is not for us to inquire why writs of error to circuit courts of appeals in actions for damages for negligence of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, *we think there was color for the motion to dismiss although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it.*"

It seems clear that the supreme court recognized diversity of citizenship as one ground of jurisdiction in this case. The fact that the defendant was a federally chartered corporation appeared on the face of the record. If, therefore, the Supreme Court had considered frivolous or unsound the allegation that defendant was a citizen of Nebraska, there would have been no color of right to a dismissal, because clearly in that case jurisdiction not only would *not* have been dependent entirely upon diversity of citizenship, but

would have been dependent *entirely* upon the fact of federal incorporation.

See also Northern Pacific Railroad Company v. Amato (1892), 144 U. S. 465.

It is true that the defendant was chartered to construct and operate a railroad from Marshall, Texas, to the Pacific Ocean, and that the completion of its entire route would have brought it into the present states of New Mexico, Arizona and California as well as Texas. The defendant has, however, elected not to construct the portion of its charter route extending through these other states, and its land grants in such states to aid in the construction of its road have been forfeited by act of congress of February 28, 1885 (23 Stat. at L. 337). The defendant has also acquired and now operates a large mileage in Louisiana and a few miles of road in Arkansas. While the defendant might under the authority of its charter, be conducting railroad business in New Mexico, Arizona and California as well as in Texas it has elected not to do so and has actually made its residence and domicile in Texas. It seems clear that if for purposes of federal jurisdiction the defendant is to be considered a citizen of any state, it should be regarded as a citizen of Texas, because it is a resident and inhabitant of that state and has the main part of its mileage and its principal and general offices there, and also because that is the state in which the part of its original charter route which the defendant elected to construct is located. Its railroad business in Louisiana (except the short spur to Shreveport) and in Arkansas is conducted without express authority of its charter and by the consent and authorization of these states and it cannot be said to have its legal home in

these states. Even if, however, the fact that the defendant was originally chartered to conduct a railroad business in the states of New Mexico, Arizona and California as well as in Texas should lead to the conclusion that it was constructively located and domiciled in those states in addition to Texas, and that by reason of such location and domicile it is a citizen of such states as well as of Texas, the defendant would merely occupy the same position for purposes of federal jurisdiction as a consolidated corporation of such states and for purposes of jurisdiction of the federal court in this case would be regarded as a citizen of Texas.

Ever since the case of Gassies v. Ballon (1832), 6 Peters 761, it has been established that, to use the language of Chief Justice Marshall, "a citizen of the United States, residing in any state of the Union, is a citizen of that state." This principle has been embodied in the first section of the Fourteenth Amendment, which provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

In Railroad Co. v. Koontz (1881), 104 U. S. 5, the Court said:

> "A corporation may, for the purposes of suit, be said to be born where by law it is created and organized."

It seems clear that the defendant is a citizen of the United States by virtue of its incorporation under the laws of the United States. That it is a resident and inhabitant of the state of Texas was held by the Supreme Court in Matter of Dunn (1909), 212 U. S. 374. The plaintiff in that case asserted that the defendant The Texas and Pa-

cific Railway Company was an inhabitant of New York and therefore could not be sued in the northern district of Texas without its consent, and the defendant urged that its residence and domicile were in the northern district of Texas. On p. 388, the court, Peckham, J., said:

> "Upon the latter question the facts on deposition before the United States district judge in Texas showed that the company maintained an office in Dallas County, Texas, and that the senior vice-president lived in Dallas, and that for many years the company had designated Dallas as its general office, and that all the acts of the board of directors taken in New York City are subsequently affirmed by the meeting of the board at Dallas before they are considered effective. We are of opinion that the defendant company was liable to suit in the northern district."

After referring to the acts of congress dividing Texas into various judicial districts and to the statutes of Texas providing for service of process the court said:

> "Under these various statutes the plaintiffs would have had the right to sue the Texas and Pacific Railway Company in the northern district of Texas, because it was a resident of and doing business within that district, and had an agent there upon whom service could properly be made."

From the facts that it is a citizen of the United States and a resident of Texas, the conclusion follows that the defendant is a citizen of Texas for jurisdictional purposes in this cause.

Second Proposition

The act of January 28, 1915, does not deprive the federal courts of their jurisdiction of this case arising out of diversity of citizenship.

Argument

If the defendant no longer can sue in the federal courts on the other grounds hereinbefore discussed, it will be at a disadvantage as compared with state railroad corporations, unless it can sue and be sued in the federal courts on the ground of diversity of citizenship. This would be contrary to the spirit of the act of January 28, 1915, which, as shown by the reports of the house and senate judiciary committees, and the discussion thereof, was intended merely to place the defendant in the same position as such other railroad corporations. The following statement by Mr. Floyd, on behalf of the house judiciary committee, is directly in point:

> "This bill was introduced by the gentleman from Texas (Mr. Beall), and the Texas Pacific Road, operating in Texas, was incorporated by act of congress, and is the *only road in the state of Texas that has the right to transfer its cases to the federal court on the ground that it was incorporated by congress, thereby giving it an advantage over other railroad corporations operating in the state of Texas.*" 52 Congressional Record 283.

Congress was seeking, at the instigation of a representative from Texas, to prevent the defendant from doing what other railroad companies operating in Texas could not do, namely, remove suits brought against it in the state courts by

citizens of Texas to the Federal courts, and by preventing it from so removing, Congress intended to place the defendant in the same position as such other railroad companies.

Résumé

1

(1) By the act of March 3, 1871, the defendant company was expressly subjected to the original jurisdiction of the federal courts, but not to their jurisdiction by removal.

(a) Such is the literal significance of the language employed in the statute.

(b) To construe it otherwise is to render it without practical effect, and to treat it as superfluous, and so is contrary to elementary rules of interpretation.

(c) The construction for which we contend is in harmony with the requirements of the time and country, and with the purpose of congress to promote the building and successful operation of a railroad for public service in a troubled time and through a wild country, when and where local courts were likely not to be of the highest character.

(d) The construction for which we contend is supported by judicial authority as high as any that possibly could be adduced, short of the direct decision of this Court.

(2) The jurisdiction thus expressly conferred and imposed by the act of March 3, 1871, has not been taken away by the act of January 28, 1915.

(a) The language of congress in taking away federal jurisdiction of a railroad company's litigations resting "upon the ground that said railroad company was incorporated under an act of congress", was accurately descriptive of a ground of jurisdiction which as a matter of practical fact did exist, and was the same language which this court habitually used in speaking of the same thing.

(b) Such language signified the federal jurisdiction which existed solely because of the constructive federal question inherent in every suit by or against a federally chartered company. It was not intended by congress to include, and in its repeated use by this Court the expression never had included, jurisdiction arising from the existence of an actual federal dispute, from express grant, or from any of the numerous sources of federal jurisdiction.

(c) To construe the act of 1915 as repealing the express grant of jurisdiction contained in the act of 1871, is to hold that a general act which contains no repealing clause, and whose terms are not inconsistent with those of an earlier special act, and which makes no reference to such act, impliedly repeals the same. This is contrary to fundamental rules of interpretation.

(d) Congress may well have intended, without the slightest inconsistency and with perfect propriety, to take away the implied jurisdiction which originated in the decision of a doubtful question by a divided

Court, without disturbing the express jurisdiction which congress itself had directly conferred; to take away from federally chartered railway companies the power to remove to the federal courts the numerous suits, mostly for damages, brought in state courts by plaintiffs who preferred those tribunals, without depriving either the companies or their adversaries of the right to resort in the first instance to the federal courts if they chose to do so.

(e) The history of the passage of the act of 1915 through the house and senate shows that the evil which congress meant to cure was the removal from the state courts to the federal courts of causes that were without other basis of federal jurisdiction, "on the sole ground that the corporation was chartered by congress"; and it shows that congress did not intend to take away federal jurisdiction of a federally chartered railway company when it could "allege some other ground provided by statute for the transfer of cases from the state to federal courts".

(f) Congress doubtless had in mind the provisions of Section 28 of the judicial code, and chose skilfully the means of accomplishing its purpose, which the act of 1915 fully does if given the construction for which we contend.

2

(1) There is in this case such a federal question as gives rise to federal jurisdiction.

(a) The act of congress whereby the defendant company was incorporated and the acts supplementary thereto regulate in great detail the issue of bonds and mortgages by the company.

(b) A railroad company can mortgage its railroad property only as authorized by its charter and governing laws.

(c) A bill to foreclose a railroad mortgage must show such authority.

(d) Therefore the question whether and to what extent the various provisions of the mortgage are valid arises on the face of the bill.

(e) A question determinable by the interpretation and application of an act of congress is a federal question.

(f) It is not essential that the decision finally turn on the question that gives jurisdiction.

(g) But this case involves federal questions that are real subjects of dispute.

(2) The act of January 28, 1915, does not take away the federal jurisdiction arising out of the federal questions involved in this case.

(a) The jurisdiction taken away by the act of 1915 is only such as exists solely by reason of the constructive federal questions arising out of the mere fact of federal incorporation.

(b) Real questions growing out of the provisions of the charter are still jurisdictional, and there are such in this case.

(c) The act of 1915 has no possible bearing on such questions as arise out of the regulative acts of 1873 and 1874, which were not acts of incorporation.

3

(1) The federal courts have jurisdiction of this case by reason of diversity of citizenship.

(a) Diverse citizenship is sufficiently alleged.

(b) The plaintiff is a New York corporation. One of the defendants is a Louisiana corporation, and the other is a federal corporation domiciled in Texas.

(c) The federal corporation defendant was chartered to do business in Texas and three other states. It has no line in such other three states, but in Texas it has its principal place of business, and its principal operating and general offices, and the greater part of its railway line.

(d) There is no reason why the legal fiction that the members of a corporation are citizens of the state of its domicile should not apply to federal corporations.

(e) Such decisions as there are on the subject sustain the applicability of such fiction to federal corporations, and the attribution to them of citizenship in their states of domicile.

(f) Defendant is a citizen of the United States because incorporated under its laws and has been held by the Supreme Court to be a resident of Texas. It is therefore a

citizen of Texas for purposes of federal jurisdiction.

(2) Jurisdiction by reason of diversity of citizenship has not been taken away by the act of 1915.

In consideration of the premises, the appellant, Bankers Trust Company, as Trustee, prays that the order of the district court dismissing the bill for want of jurisdiction be reversed, and that the cause be remanded with instructions to said court to hear and determine the same.

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE,
APPELLANT,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND
NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

REPLY BRIEF FOR APPELLANT.

MAURICE E. LOCKE, *Dallas, Texas,*
WILLIAM W. GREEN, *New York City,*
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

REPLY BRIEF FOR APPELLANT.

Preliminary.

Two briefs have been filed in behalf of The Texas and Pacific Railway Company, one by its counsel and the other, styled an "additional brief," by counsel for a "protective committee of stockholders." We shall deal with both these briefs, arranging what we wish to say in sections headed by the numbers of the pages containing the matter to which response is made.

ARGUMENT.

Brief, Page 6.

It is not necessary to consider now whether the italicised quotation from Chief Justice Marshall's remarks in the Osborn case would state accurately the result of such a grant of jurisdiction as we claim exists in the act of March 3, 1871, since as to amount and situs of controversy this case clearly is one proper to be brought where it was brought. We do not see, however, why such a statute should be held to give federal jurisdiction over petty controversies regardless of other pertinent statutes, or why it should be held to authorize suit away from the venue otherwise established. Perhaps it was partly a reservation of this question which Mr. Justice Miller had in mind when, in Smith *v.* Union Pac. R. Co., 2 Dillon, 278 (our original brief, p. 11), he held that the same language now under interpretation made the Union Pacific Railroad Co. "capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties." Certain it is that neither Mr. Justice Miller in the Smith and Bauman cases, nor Chief Justice Waite in Pacific Railroad Removal Cases, could have overlooked this remark in their careful examination of the Osborn case.

Brief, Pages 6, 7 and 10.

On each of these pages it is assumed as the major premise of the argument that the language of the jurisdictional clause in the act of March 3, 1871, is substantially the same as that of section 3 of the charter of the first Bank of the United States, which the court held did not confer jurisdiction. We submit that the two clauses are very different, and that the clause in the act of 1871 is more nearly like that in section 9 of the bank charter, which Chief Justice Marshall said did

confer federal jurisdiction. For easier comparison, we print the clauses in parallel columns.

Bank Charter.	Act of 1871.
Section 3.	
"To sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, *in courts of record, or any other place whatsoever.*"	"To sue and be sued, plead and be impleaded, defend and be defended, *in all courts of law and equity within the United States.*"
Section 9.	
An action of debt may be brought *"in any court of record of the United States, or of either of them."*	

The language of section 3 of the bank charter means nothing more than to say that the bank can have its controversies heard in courts and whatsoever other tribunals (*e. g.*, nowadays, bank commissioners) may hear controversies. There is no mention of any particular tribunal or class of tribunals. But in section 9 courts of record "of the United States or of either of them" are given jurisdiction in language pronounced sufficient. These words seem to us no more definite and no more inclusive than those by which in the act of 1871 jurisdiction is given to "all courts of law and equity within the United States," save for the irrelevant difference between a court of record and a court of law and equity. The expression "all courts within the United States" includes precisely the same tribunals as the expression "all courts of the United States or of either of them." All courts within the United States are courts of the United States or of one of them; and all courts of the United States or of either of them are courts within the United States.

Brief, Page 8.

Of course we do not know just what Mr. Justice Miller had in mind when he said jurisdiction was given to "the federal courts which have jurisdiction of the same class of actions between other parties." It may have been what we have already suggested (*ante*, 2). Or it may have been the fact that the district courts were courts of bankruptcy and admiralty and the circuit courts were courts of general law and equity jurisdiction, and this court had original jurisdiction in cases involving ambassadors, ministers and consuls. Or it may have been both these matters. What he held was that the circuit court had jurisdiction of a personal injury action.

Brief, Page 9.

There is nothing that shows that any member of the court differed from Chief Justice Waite and Mr. Justice Miller in the interpretation which they placed upon the charters in Pacific Railroad Removal Cases. These were removal cases, and the charters did not confer jurisdiction by removal. Holding that jurisdiction by removal existed for other reasons, the majority had no occasion to say anything about this matter. Not being able to agree with this, the minority thought it proper to avoid misconception by stating just what their views were upon the whole question of federal jurisdiction over the defendant companies.

Brief, Page 11.

We see no reason for assuming that Congress might not wish to abate a nuisance by taking away one ground of jurisdiction which had been abused, without desiring to take away another ground which had not been abused, and the resort to which might promote the efficient and orderly administration of justice, as all concerned agree that it would do in this case.

Brief, Page 12.

Counsel say: "It is a fact, judicially known to this court, and uncontroverted, that the act of 1915 does not apply to any railway corporation except The Texas and Pacific Railway Company." The act of 1915 is general in its terms, and applicable to any railroad company incorporated under an act of Congress. The court knows judicially that several have been so incorporated. We do not see how it can know judicially that they all have been dissolved, or have become inactive. In fact, we are informed that at least three federally chartered railroad companies are still in existence. At any rate, Congress saw fit to enact a general law and not a special law, notwithstanding the fact that the evil which called it into action was the abuse by this one company of its privilege of removing damage suits from state courts to federal and then bringing them here, solely upon the accidentally existing ground, having no bearing upon the questions involved, that it has a charter from the United States (224 U. S., 582). Congress aimed intelligently at that evil, whether practiced by the defendant company or by some other, and struck it down. See pages 32 and 35-40 of our original brief.

Brief, Pages 19 to 24.

Our contention is that the act of 1915 was intended by Congress to do what its exponents in Congress said it was meant to accomplish—to prevent such a company as the defendant from taking its cases to the federal courts "on the sole ground that it is a corporation authorized by Congress," or "the sole ground that the corporation was chartered by Congress," and to require it to "allege some other ground provided by statute" (our original brief, p. 36). We think Congress meant just what this court seems to us to have meant by its repeated expressions quoted on pages 21 to 31 of our original brief. And those expressions we under-

stand this court to have applied to the numerous cases coming before it wherein the federal question constructively involved had "no bearing upon the questions raised and federal jurisdiction was maintained "solely because plaintiff in error is incorporated under an act of Congress" (our original brief, pp. 27-31.)

To illustrate: In a personal injury action there is constructively involved the federal question whether the defendant is a corporation with power to operate a railroad, and none other. But this question, though always constructively present, is never present in fact, and if actually raised it probably would be pronounced frivolous. The situation is like that in the numerous land and mining claim cases cited by the appellees, wherein the court has said that a real federal question must be the foundation for federal jurisdiction. Compliance with the land laws or mining claim laws of Congress is theoretically or constructively the first link in the chain of title. But in fact titles are treated as starting with the patent, and only in the rare litigations which go behind the patent is there a real federal question. In the personal injury action it seems entirely correct to say that federal jurisdiction depends upon the mere fact of federal incorporation. But the inquiry whether bonds and a mortgage in suit comply with the detailed prescriptions of four relevant acts of Congress is a quite different matter. It presents a real federal question which must be determined, even though not debated and even though the corporation issuing the papers be not before the court, both of which facts existed in Male *v.* Atchison, T. & S. F. Ry. Co., 240 U. S., 97. On pages 42-45 of our original brief we have tried to show that some phases of this question are likely to be the subjects of actual contest in the present case. This issue arises independently of the fact that the company was chartered by act of Congress. It is an accidental and collateral circumstance, and not of the essence of the thing, if the prescriptions are found in the charter, as some of them in this case are.

Counsel for the appellee claim that the act of 1915 was intended to repeal the doctrine of the Osborn case, in so far as railroads are concerned. We think not. The decision of the Osborn case was that it was within the power of Congress to subject by express enactment a federally incorporated company to the jurisdiction of the federal courts; nothing more. We do not see in the act itself, in the proceedings of Congress, or in the antecedent conditions, any indication that Congress intended to disturb this ruling. Indeed it could not have done so if it would. But Congress did intend, we think, wholly and solely to repeal the doctrine of the Pacific Railroad Removal Cases, that federally chartered railroad companies were entitled *as such* to remove to the federal courts cases brought against them in the state courts, and the concomitant doctrine that the federal courts had original jurisdiction of such suits. Federal incorporation was the only jurisdictional fact involved in any of these seven cases, and the sufficiency of that single fact was the matter, and the only matter, therein determined.

Brief, Page 20.

Additional Brief, Page 5.

Much stress is laid upon the fact that federal jurisdiction over any suit "by or against" any railroad company upon the ground that it has a federal charter is denied. We see nothing significant in this phrase. The act of March 3, 1875, and the various amendments thereof to and including sections 24 and 28 of the judicial code of 1911, had given federal jurisdiction, original and by removal, of cases arising under the laws of the United States; and it had been conclusively determined by this court that all suits by or against federally chartered companies were suits arising under the laws of the United States. Moreover, under the act of March 3, 1891, and under section 128 of the judicial code, in such cases the jurisdiction of the circuit courts of appeals was

not final, but the cases could be brought here. There was no objection to the statutes in their general application; but in the application of the statutes and the rule established by Pacific Railroad Removal Cases to the litigations of federal corporations two great evils had manifested themselves, (1) the constant removal of cases for whose removability there was no good reason, and (2) the constant bringing to this Court of cases for whose exceptional right of resort to this Court there was no good reason (our original brief, p. 32). Congress wished to cure these two evils without disturbing the general system. It could and did accomplish this purpose by enacting, as we think, that no federal court should have jurisdiction of any suit by or against any railroad company solely upon the ground that it had a federal charter. To have done less would have lessened the evils, but would not have removed them.

Brief, Pages 23 to 25.

The distinction between real federal questions and constructive federal questions may be illustrated further by the cases which counsel for the appellee puts on pages 23-24. The first is a personal injury case, wherein the federal question would be purely constructive, because from the face of the complaint it must appear that no substantial federal question did or could arise. The action to recover the contract price for 50,000 cross-ties and that to recover the agreed price for constructing ten miles of railroad might or might not involve real federal questions. If from the complaint it appeared that the cross-ties were bought for the maintenance of existing lines or the construction of track which the company had the clear right to construct, and that the ten miles of new track were sidings for its main line in Texas, the only federal question would be whether the company was a corporation with authority to maintain a railroad, a question which at this time is frivolous, a question which is not in fact a question, and which exists only con-

structively. But if the complaint indicated that the crossties were bought for resale, the federal question would be of very different character. And so it is with the third case, which is intended to represent the one at bar. Suppose the federal charter or some other controlling act of Congress limits the amount which the company may borrow, or the rate of interest it may pay, or the purposes for which it may mortgage its property, or the term for which it may defer repayment, or the remedies it may give to the mortgagees, is it not evident that in any suit to enforce the company's bonds and mortgage these statutory limitations are real factors in the litigation?

Brief, Page 28.

As above indicated, we admit the correctness of the decision in the Osborn case, and rely upon it, and consider its doctrine wholly without the scope of the act of 1915. We do not dispute the correctness of the decision in the Pacific Railroad Removal Cases; but we think the doctrine of those cases and its necessary concomitant constitute precisely the rule of law which Congress could and did abrogate by the act of 1915.

Brief, Pages 29 to 30.

The national bank cases cited on pages 48-51 of our original brief seem to us pertinent to the discussion in this. However different from the act of 1915 in other particulars, the acts of July 12, 1882, and March 3, 1887, are like it in taking away from the federal courts jurisdiction over the corporations affected, based upon the fact that they were incorporated under an act of Congress, and beginning with the Cooper case this court has repeatedly so held (120 U. S., 778; 142 U. S., 644; 191 U. S., 119; 238 U. S., 107; our original brief, pp. 22-24 and 25-27). And yet it was held in all the cases cited that the federal courts had jurisdiction

of controversies involving (in the Windsor Bank case *sub silentio* and very remotely) the interpretation and application of the national banking act, under which all national banks are incorporated. It follows that a federal question growing out of a federal charter may still be jurisdictional after the mere existence of such federal charter has ceased to be so.

Brief, Page 30.

We still think that, as bearing upon the application of a statute taking away jurisdiction based upon the ground that a company was incorporated under act of Congress, there is merit in the distinction (our original brief, p. 52) between the act by which it was incorporated and later acts dealing with it as an existing corporation and regulating its actions as such. The acts of 1873 and 1874 were of this character.

Brief, Pages 35 to 38.

Additional Brief, Pages 6 and 7.

Appellee urges, first, that diversity of citizenship is not sufficiently alleged; second, that the appellee is not a citizen of any state for purposes of federal jurisdiction; third, that, if it should be regarded as a citizen of any state, it is not a citizen of Texas, but a citizen of New York.

We did not intend to devote much space to arguing the sufficiency of the allegations of the bill, but since the appellee appears to urge this question seriously, we feel called upon to reply.

The direct allegation that a corporation is a citizen of a certain state is merely a conclusion and is in itself of no value. It is necessary only to allege the facts from which such citizenship can be deduced. Appellee cites several cases in which this court has said that it is not sufficient that juris-

diction may be inferred *argumentatively* from the pleading. We understand that this statement does not mean that if all the essential facts which by legal intendment show citizenship are clearly and positively alleged the pleading is insufficient. In fact this court, in the very cases relied upon by the appellee, has said:

> "In the last case it is said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, *or the facts which in legal intendment constitute it*, should be distinctly and positively averred in the pleadings or they should appear affirmatively and with equal distinctness in the other parts of the record'" (Italics ours). Grace *vs.* American Central Insurance Co., 109 U. S., 278, at pp. 283-284.

and also:

> "We are not required to say that it is essential to the maintenance of the jurisdiction of the circuit court of such a suit that the pleadings should refer, *in words*, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, *but only that the essential facts averred must show*, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance" (Italics ours). Hanford *vs.* Davies, 163 U. S., 273, at p. 280.

What we understand the word "argumentatively" to mean in this connection is that it is not enough for the pleadings or the record to show some but not all of the essential facts constituting citizenship, because in that case the court must jump to conclusions by inference in order to supply the missing facts, and the Grace case relied upon by the appellee is a good illustration of the correctness of our interpretation. There was no evidence that any of the plaintiffs in that case were citizens of the United States, and in respect to one of them there was no evidence or allegation that he was a resident of any state. We need only cite to this court its comparatively recent decision in *Sun Printing and Publishing*

Association vs. Edwards, 194 U. S., 377, where neither the citizenship of the plaintiff nor that of the defendant was alleged in so many words, and where this court looked at the entire record and culled therefrom the various facts which, as a matter of law, showed the citizenship of the parties.

Appellee also urges that "a person may be a citizen of the United States and not a citizen of any particular State" (Brief, p. 38). We admit this. But it was held as early as 1832 by Chief Justice Marshall, in *Gassies vs. Ballou*, 6 Pet., 761, that an averment that the defendant had caused himself to be naturalized an American citizen and was residing in Louisiana was equivalent to a direct averment of citizenship and was sufficient for purposes of federal jurisdiction. The doctrine of this case has been reaffirmed in the two later cases, *Clausen vs. American Ice Co.*, 144 Fed., 723, and *Littell vs. Erie R. Co.*, 105 Fed., 539. In the latter case the court said, referring to the allegation that the plaintiff was a citizen of the United States and a resident of New Jersey:

> "This allegation is therefore, a full equivalent of what a direct one would be that the plaintiff is a citizen of New Jersey."

The bill alleges that the appellee was incorporated under the laws of the United States, which is an allegation that it is a citizen of the United States. The fact that it is a citizen of the United States is admitted by the additional brief for the appellee (p. 10). The appellee is also alleged to be a resident and inhabitant of the Northern District of Texas. In addition to these allegations all the facts upon which the legal validity of appellant's claim that the appellee is a citizen of Texas depends are sufficiently alleged or judicially noticed. The facts as stated must be assumed to exist as stated, for we are considering a motion to dismiss for reasons appearing upon the bill, not for reasons set up in a plea and duly proven, and particularly not for reasons apparent only in the brief of counsel. These facts may be epitomized as

follows: (1) The company was created by act of Congress. (2) It was created for the purpose of building and operating a line of railroad from a point in Texas, through Texas, New Mexico, Arizona and California, to a point in California. (3) It has its principal place of business and its principal operating and general offices at Dallas, in Texas, and is there resident and inhabitant. (4) Of its line of railroad, 1039 miles are in Texas, 779 in Louisiana, and 32 in Arkansas. (5) The lands granted to it by Congress along its to-be-adopted line in New Mexico, Arizona and California, as an aid in the construction of its line, were declared forfeited and restored to the public domain in 1885; see 23 Stat. at L., 337. (6) The only act which its charter provided should be done in New York was the causing of subscription books to be opened and the publishing of certain relevant notices there and in New Orleans and Washington. Our contention is that these allegations show Texas citizenship and negative New York citizenship.

We invite the attention of the court to *Manufacturers National Bank vs. Baack*, 16 Fed. Cas., p. 671, where Judge Blatchford, in an exhaustive opinion considering this very question of the sufficiency of the allegation in respect of the citizenship of a federal corporation, brushed aside the direct allegation that the plaintiff corporation was a citizen of Illinois and looked at the facts averred in the bill with regard to the status of the corporation, and based his decision upon the facts so alleged.

Brief, Pages 38 to 45.
Additional Brief, Pages 7 to 11.

But appellee urges that it is not a citizen of any state for purposes of federal jurisdiction. It dismisses lightly the six or seven decisions in respect of the citizenship of national banks, the only cases where this question has ever been squarely passed upon, saying that it does not "concede the correctness of the decisions cited nor accept them as final authority," and endeavors to distinguish these cases. We sub-

mit that these cases (our brief, pp. 60-62) are directly in point, and that an application of the principles there laid down leads inevitably to the conclusion that the appellee is a citizen of Texas. Appellee's counsel ignore the case of *Union Pacific Ry. Co. vs. Harris*, 158 U. S., 326 (our brief, pp. 62-65), where this court intimated in respect of the Union Pacific that jurisdictional diversity of citizenship existed.

Appellee contends that prior to the act of 1915 federal jurisdiction over suits by or against federal railroad corporations did not exist on the ground of diverse citizenship, but rested exclusively on the proposition that such suits arose under the Constitution or laws of the United States. It is urged on page 9 of appellee's additional brief that "The truth of the first" (the foregoing) "proposition was declared by this Court in that portion of the opinion in the Pacific Removal cases (*supra*), where the decision of this Court in the Osborn case is analyzed." Appellee states this portion of the Court's decision as follows (p. 9, additional brief):

> "In classifying the cases—four in number and one embracing controversies between citizens of different States—to which the judicial power of the United States is confined by the Constitution, this court pointed out that suits by or against the United States Bank could not possibly belong to any of these classes except the one which included cases arising under the Constitution and laws of the United States."

Appellee's counsel, however, in their statement of this court's opinion, omit the significant words "*as such.*" What Mr. Justice Bradley did say (115 U. S., 12) was:

> "Now, suits by or against the United States Bank could not possibly, *as such*, belong to any of these classes, except the first, namely, cases in law and equity arising under the Constitution, laws or treaties of the United States" (Italics ours).

What Mr. Justice Bradley was explaining was that, in the Osborn case, in which was examined the constitutionality of

the charter grant conferring jurisdiction over *all* suits by or against the United States Bank, it was held that such constitutionality must be measured by the four classes of cases to which the Constitution confined the judicial power of the United States. In speaking of these four classes, he said that suits by or against the bank could not *as such* belong to any class, except the first. This means merely that a suit by or against the bank might or might not belong to any one of his last three enumerated classes, but that one could not say that any and all suits by or against the bank must necessarily belong to any class except the first. For example, if an ambassador sued the United States Bank, such a suit would fall within the second class enumerated, namely, cases affecting ambassadors, other public ministers and consuls. Again, if the United States Bank should file a libel in admiralty, such a suit would fall within the third class enumerated, namely, cases of admiralty and maritime jurisdiction. The mere statement of these propositions exposes the fallacy of appellee's contention that Mr. Justice Bradley meant to say that *no* suit by or against the United States Bank could be entertained in the federal courts on the ground of diversity of citizenship.

The case of *Scott vs. Choctaw, Oklahoma & Gulf R. R. Co.*, 112 Fed., 180, cited at page 45 of appellee's brief, was a case where the federal corporation in question had its principal office and was a resident and inhabitant of Indian Territory. See *Wolff vs. Choctaw, Oklahoma & Gulf R. R. Co.* (1904), 133 Fed., 601, where the court held that this corporation could not be sued in a district court in Arkansas, inasmuch as it was not a resident and inhabitant of that state, but of Indian Territory. Of course the suit was not and could not be between citizens of different states, but between a citizen of a state and a citizen of a territory, and the statement of the district judge, quoted in appellee's brief, must be assumed to have been made with this fact in mind.

We invite attention to the Smith and Bauman cases, *supra,* decided by Mr. Justice Miller (our brief, pp. 11, 12). Speaking of the Union Pacific he said in the latter case:

> "I have heretofore held that it was suable in this court *by a citizen of another State*—Smith *vs.* Union Pacific R. Co.—and I am of opinion on consideration of the provisions of the charter, that it may sue and be sued in this district, *without reference to the citizenship of the adverse party*" (Italics ours). Bauman *vs.* Union Pacific R. Co., 3 Dillon, 367.

There remains to be considered appellee's contention that, if for jurisdictional purposes it is a citizen of any state, it is a citizen of New York.

As to the statement of facts appearing on page 7 of appellee's additional brief, we wish to say merely that it is not founded on the record, is by no means admitted to be correct, and we are sure will receive no attention from the Court. The question of the location of the principal office and domicile of the appellee was exhaustively considered in *Matter of Dunn,* 212 U. S., 374. Evidence with regard to the facts bearing upon the question of domicile was adduced before Judge Meek in that case and is in the record of that case filed in this Court. After a careful consideration of the facts, Judge Meek held that the appellee was a resident and inhabitant of the Northern District of Texas and liable to suit in that district without its consent. Upon a petition for a writ of mandamus, this court sustained the decision of Judge Meek. It was urged before this Court by counsel for the plaintiff (we are quoting from his brief):

> "The Texas & Pacific Railway Company is an inhabitant of the Southern District of New York and not of the Northern District of Texas."

And all the facts bearing on this question were before this Court in that case. This Court decided, Mr. Justice Peckham delivering the opinion, that the appellee here was a resi-

dent of the Northern District of Texas and was liable to suit therein without its consent under the federal statutes, which provide that suit must be brought in the district of which the defendant is a resident and inhabitant.

Appellee's chief reliance on this point is in the case of the *Texas & Pacific Railway Company vs. Interstate Commerce Commission,* 57 Fed., 948, affirmed 162 U. S., 204. In this case the lower court held on petition and answer and without evidence on the point of location of principal office that for the purposes of a statute which gave the Interstate Commerce Commission power to sue either in the district where the alleged violation of law was committed or where the defendant had its principal office, the appellee had its principal office in the Southern District of New York and that suit was properly maintained there under the statute. We submit that all that is meant by the decision in this case is that the appellee had a principal office in New York within the meaning of this statute, which has received a liberal construction in order to facilitate the work of the Interstate Commerce Commission. In both the cases last mentioned, as well as in that of Texas & Pacific Ry. Co. *vs.* Bigger, 239 U. S., 330, the company claimed, and in the Dunn case proved, that its domicile was in Dallas. But here we have to do with an undisputed allegation that its principal place of business and its principal operating and general offices are in Dallas, and no question of fact is involved.

Referring to the Dunn case, appellee states that "no complaint is made of that decision," but says that the question whether the appellee is a citizen of Texas was not involved and was not considered in that case. Plaintiffs in that action in their brief, point IV, subdivision 1, argued that the appellee here was a citizen of the state of New York. It cannot be doubted that this Court would not have held that the appellee was a resident and inhabitant of Texas if it had looked with favor upon this contention of the plaintiff in that case. It seems to us that the questions

of residence and citizenship of a corporation are so interwoven and so governed by the same principles that the decision by this Court in the Dunn case is in effect a decision that the appellee is a citizen of Texas for purposes of federal jurisdiction.

Additional Brief, Pages 10 and 11.

We do not doubt the sincerity of the suggestion of counsel for the protective committee of stockholders that they prefer that this suit be tried in the federal courts. So must every reasonable person. The federal courts alone are equipped for such matters, and they are especially so since the enactment of the judicial code of 1911. It would indeed be unfortunate if this Court should find itself compelled to hold that the act of 1915 had swept away every possible ground of federal jurisdiction over such a case. But we do not believe that Congress has done this. We believe it has cured the evils at which its act was directed, and at the same time has left open the entrance to the federal courts for cases like this, which unquestionably belong there.

Respectfully submitted,

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Counsel for Appellant.

Office Supreme Court, U. S.
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JAMES D. MAHER
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 889.

BANKERS TRUST COMPANY, as Trustee,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

BRIEF ON BEHALF OF APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
Solicitors for Appellee, The Texas and Pacific Railway Company,
165 BROADWAY,
New York City,
New York.

ARTHUR J. SHORES,
THOMAS J. FREEMAN,
GEORGE THOMPSON,
HENRY C. COKE,
ALEXANDER S. COKE,
Of Counsel.

C. G. Bedborough, 32 to 38 Spring Street, New York.

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Supreme Court of the United States.

BANKERS TRUST COMPANY, as Trustee, Appellant, v. THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS PACIFIC RAILWAY COMPANY, Appellees.	Term No. 889.

BRIEF OF THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLEE.

Additional Statement of the Case.

Appellant's statement of the case is substantially correct. We add, however, that it affirmatively appears from the Bill of Complaint that interest upon the second mortgage income bonds is only payable out of the net income of the Railway Company as the same may be determined by its Board of Directors, and it appears from the Bill that if any interest is in default it would require an accounting for the purpose of ascertaining the amount, as the coupons upon their face show that interest is payable only in the event it is earned (Tr., 53, 55).

The following further facts should perhaps be given emphasis:

(*a*)

In Paragraph II. of the Bill of Complaint, after reciting that The Texas and Pacific Railway Com-

pany is a corporation duly created under the laws of the United States and has its principal place of business and its principal operating and general offices in the City of Dallas, Texas, it is alleged that the defendant The Texas and Pacific Railway Company is a *resident* and *inhabitant* of the Dallas Division of the Northern District of Texas. It is nowhere alleged that The Texas and Pacific Railway Company is a *citizen* of the State of Texas (Tr., 2).

(*b*)

The Act incorporating The Texas and Pacific Railway Company provided among other things, that the persons named in the first section of the Act should constitute a Board of Commissioners who should meet in the City of New York within ninety days after the passage thereof * * * and cause books to be opened for the subscription of capital stock, and that it should be lawful for such subscribers or stockholders to organize the company in accordance with the provisions of the Act, and to elect Directors, which said Directors should immediately proceed to elect a President. (Act of March 3, 1871, 16 Stat., 573).

(*c*)

Paragraph IV. of the Bill of Complaint expressly alleges that by virtue of its act of incorporation and the provisions therein included authorizing the The Texas and Pacific Railway Company to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States, jurisdiction was conferred upon the District Court of the United States at Dallas (Tr., 4).

(*d*)

Paragraph XXXVI. of the Bill of Complaint expressly alleges that the suit is one of a civil nature in

equity, and the matter in controversy exceeds the sum of $5,000.00, and arises under the Constitution and laws of the United States (Tr., 45).

(*e*)

It is nowhere alleged in the Bill of Complaint that The Texas and Pacific Railway Company is a citizen of the State of Texas, or that the District Court of the United States for the Northern District of Texas has jurisdiction of the cause by reason of same being a suit between citizens of different states.

It will be convenient to discuss the three general grounds of federal jurisdiction relied on by the appellant in the order in which they are presented in the appellant's brief.

BRIEF OF THE ARGUMENT.

I.

Can jurisdiction be maintained by virtue of a grant thereof in the charter of The Texas and Pacific Railway Company?

In reply to the contention that jurisdiction of such suits as this against The Texas and Pacific Railway Company was expressly vested in appropriate Federal Courts by the Act of Congress of the United States incorporating the Company, we make the following propositions:

FIRST: The Act of Congress of the United States creating The Texas and Pacific Railway Company and which provides that it shall be able to "sue and be

sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States" was not intended to enlarge the jurisdiction of any particular court, but was to give a capacity to the corporation to appear as a corporation in any court which would by law have cognizance of the case if brought by individuals.

SECOND: Where there is no general law giving to the Courts of the United States jurisdiction of suits by or against a corporation created by an Act of Congress, in order to confer special jurisdiction upon such Courts, it must clearly appear that such jurisdiction was conferred by special grant and in express terms.

THIRD. At the time The Texas and Pacific Railway Company was incorporated by an Act of Congress, there was no general law giving to federal courts original jurisdiction of suits "arising under the laws of the United States," and if it be true that the Act incorporating The Texas and Pacific Railway Company did confer jurisdiction on appropriate courts of the United States, the jurisdiction so conferred has been withdrawn by the Act of Congress of January 28, 1915.

AUTHORITIES.

Act of March 3, 1871 (16 Stat., 573); Act of March 3, 1875 (18 Stat., 470); Act of January 28, 1915 (38 Stat., 803); *Bank of the United States vs. Deveaux and others*, 5 Cranch., 61; *Osborn vs. Bank of the United States*, 9 Wheat., 738; *Pacific Railroad Removal Cases*, 115 U. S., 1; *Rodgers vs. United States*, 185 U. S., 83; *Smith vs. Union Pacific Railroad Company*, 2 Dill., 278.

Argument.

In order that we may ascertain precisely what was meant in the Act incorporating The Texas and Pacific Railway Company, (16 Stat., 573) wherein it is provided

that such corporation "shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States", we desire briefly to reviewthe law concerning the jurisdiction of federal courts as it then existed, and the decisions of this Court bearing upon this question.

Under the Constitution of the United States (Art. III, Sec. 2) the judicial power of the United States was confined to four classes of cases, viz.: (1) to cases in law and equity arising under the Constitution of the United States, the laws of the United States, and treaties made under their authority; (2) to cases affecting ambassadors, public ministers and consuls; (3) to cases of admiralty and maritime jurisdiction; and (4) to certain controversies depending upon the character of the parties.

Suits by or against a federal corporation could not as such belong to any of these classes, except to the first, that is, to cases in law and equity arising under the Constitution of the United States and under the laws and treaties of the Unit d States (*Pacific Railroad Removal Cases*, 115 U. S., 1, 12).

In the case of *Bank of the United States vs. Deveaux* (5 Cranch. 61, *Feb. Term*, 1809), it appeared that the Bank of the United States was incorporated by an Act of Congress of the United States. By the Judiciary Act of 1789 then in force (1 Stats., 83) the jurisdiction of the Circuit Courts of the United (then the trial courts) was (with a single exception not here important) extended only to cases where the constitutional right to plead and be impleaded in the Courts of the Union depended upon the character of the parties, and did not embrace suits "arising under the laws of the United States."

As was then understood, and as was more completely demonstrated in the later case of *Osborn vs. Bank of the United States*, a suit against a federal corporation was a suit "arising under the laws of the United States," but there being no general law giving the Circuit Court jurisdiction over a suit "arising

under the laws of the United States," the question necessarily arose whether the Circuit Court did have jurisdiction over suits by and against the Bank by virtue of express powers and grants contained in the act of incorporation. It was insisted by the able counsel for the Bank that the grant of power therein made "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended in courts of record or any other place whatsoever" fully vested the Circuit Court of the United States with express jurisdiction of all suits by or against the Bank. In answer, however, to this argument Chief Justice MARSHALL used the following convincing language (p. 83):

> "This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. *If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be.*"

At the time The Texas and Pacific Railway Company was incorporated by Congress (1871) this holding had never been questioned by any decision of this Court.

It must, therefore, be assumed that when it created the Texas and Pacific Railway Company and gave to it practically the same power to sue and to be sued, as was contained in the first act creating the Bank of the United States, Congress understood the construction placed upon the use of these terms as defined by Chief Justice MARSHALL in the case of *Bank vs. Deveaux.*

Then again, in the case of *Osborn vs. Bank of the United States* (9 Wheat., 738, *Feb. Term* 1824) it appeared that the Congress of the United States had recognized the force of the decision in the Deveaux

case, *supra*, and after enacting the general provision that the Bank should be able in law to "sue and be sued * * * in all State courts having competent jurisdiction", had added an express grant in words as follows: "*and in all circuit courts of the United States.*"

Recurring to the case of *Bank vs. Deveaux,, supra*, it will be noted that Congress in the charter there under consideration, had granted express jurisdiction to federal courts in certain classes of suits, to wit: specific cases of mal-administration on the part of certain officers of the bank.

Observing the clear rule of law as laid down by this Court in the cases above referred to, and the fact that Congress, when incorporating the Bank of the United States in the second instance, had recognized that in order to confer federal jurisdiction it was necessary to do so in express terms, provided that the Bank should have the right to sue and be sued "*in all circuit courts of the United States*", and, bearing in mind that this rule of construction had never been questioned by this Court, it seems unquestionable that if Congress had intended to confer special jurisdiction upon courts of the United States, when it incorporated The Texas and Pacific Railway Company, it would have conferred such jursdiction in clear terms as was done in the act of incorporation considered in the case of *Osborn vs. Bank, supra*. Not having done so, but having on the contrary used the general words substantially contained in the Federal Act of incorporation considered in the Deveaux case, there can be no escape from the conclusion that Congress intended said general words to mean exactly what Chief Justice MARSHALL said they did mean in the Deveaux case.

By the Judiciary Act of March 3, 1875 (18 Stat., 470), Congress for the first time gave to the Circuit Courts of the United States general original jurisdiction of suits "arising under the laws of the United States," and it has been by virtue of this Act and its supplements, and to a limited extent the special

removal Act of 1868, that the Circui tCourts have exercised jurisdiction over suits by and against the Texas and Pacific Railway Company. Mere general terms as used in the charter wou d not have been sufficient.

As against this contention we are cited to the case of *Smith vs. Union Pacific Railroad Company* (2 Dill., 278), where Mr. Justice MILLER, presiding, rendered the short opinion quoted in the brief of counsel for appellant herein. The learned Judge did not attempt to discuss the position taken by him, nor to justify his conclusion by any line of reasoning or citation of authorities. We are, therefore, unable to understand what line of reasoning was adopted to r ach the conclusion which he did reach. If we may be permitted to criticise the opinion of so able and learned a Judge, we may here say that even in reaching the conclusion announced by him he was forced to add something to the statutory provision contained in the charter of the Union Pacific Railroad Company. The provision simply gave to the Railroad Company the right to sue and be sued, in all courts of law and equity within the United States. If this was an express grant of jurisdiction to the federal courts, it would necessarily follow that such jurisdiction would exist with ut limitation as to amounts, or the questions involved. Mr. Justice MILLER apparently qualified this grant by limiting it to such cases as th federal courts would have jurisdiction of between other parties. In other words, as we understand the opinion, if in suits between other parties the federal courts only had jurisdiction where the amount exceeded a given sum, then this express grant contended for would be limited to such suits as involved a similar amount, when in truth and in fact no such limitation was expressed in the grant contained in the charter. The appellant contends that these views were carried forward in the dissenting opinion filed in the *Pacific Railroad Removal Cases*, where Chief Justice WAITE, speaking for himself and Mr. Justice MILLER, stated: "Neither do I doubt that

Congress did, in the charters under which these corporations exist, authorize suits by or against them to be brought in any of the courts of the United States as well as in the courts of the State." It is evident, however, that Mr. Justice BRADLEY, speaking for a majority of the Court, did not entertain such a view, but to the contrary, adopted the view of Chief Justice MARSHALL in the case of *Osborn vs. Bank*, *supra*, and held that a suit by or against a corporation of the United States was a suit " arising under the laws of the United States ", and followed that with an application of the Act of 1875, which granted to the Circuit Courts of the United States jurisdiction of suits " arising under the laws of the United States ", and having concluded that a suit against a Federal Corporation was a suit " arising under the laws of the United States ", reached the conclusion that the suits referred to in the opinion were suits of which the Circuit Court of the United States had jurisdiction under the Act of 1875.

Reference is had in the brief of appellant to its counsel's view of the history of the times when The Texas and Pacific Railway Company was chartered. It is said therein that " the greater part of the country through which it was to pass was in the hands of Indians, Mexicans and pioneers. As to the remainder, the prevailing conditions were even worse, for those were the days of reconstruction when the carpet bagger and Ku Klux clansmen were struggling for control."

From this it is argued that the persons securing the charter of The Texas and Pacific Railway Company, as well as Congress did not desire to have the legal affairs of the Company submitted to state courts where the Indian, Mexican, pioneer, carpet bagger and Ku Klux clansman might possibly be a judge or juror and therefore thought it wise to extend the protection of the federal courts over suits either by or against it.

As far back as, approximately, the year 1800, it is to

be observed that Congress was willing to give to the United States Bank the right of federal jurisdiction. In the first instance, *Bank vs. Deveaux* (5 Cranch, 61), it was limited to certain cases growing out of the maladministration of its officers. In the second instance, *Osborn vs. Bank* (9 Wheat., 738), it was conferred generally. At those dates, if we read history correctly, the carpet bagger and the Ku Klux clansmen were unknown and we are not advised that either the Indian or Mexican was a menace to the enforcement of the law. It is true, the pioneer was a factor in the civilization of the country but this is the first time we have ever heard of a strong and sturdy class of people being considered a menace in the administration of the laws of our country.

It does occur to us, however, that if Congress had in mind the terrors of the "carpet baggers" and "Ku Klux Clansmen", and, therefore, desired to throw around The Texas and Pacific Railway Company the protection of the federal court it would have made federal jurisdiction *exclusive* and the charter would have contained a clear grant such as was contained in the second charter of the Bank of the United States. In other words, if express jurisdiction was intended to be conferred on the federal courts, would not Congress have stated the ground as follows:

> And shall be able "to sue and be sued, plead and be impleaded, defend and be defended in all state courts of competent jurisdiction within the United States *and in the circuit courts of the United States.*"

Congress, however, did not do so but to the contrary, used the same general terms as were contained in the charter considered in the Deveaux case which had been expressly decided by Chief Justice MARSHALL to confer no federal jurisdiction whatever.

Would it not be appropriate here to observe assuming the horrors of the Indian, Mexican, carpet

bagger and Ku Klux clansman to have been the producing cause for conferring federal jurisdiction upon The Texas and Pacific Railway Company by its Act of Incorporation, that after such conditions had passed away Congress by virtue of the Act of 1915 treated the case as one of removed danger and therefore withdrew the jurisdiction originally created for a special purpose?

If it should be conceded that the power to sue and be sued contained in the charter of The Texas and Pacific Railway Company, conferred jurisdiction upon United States courts of suits by and against that Company, the effect of the Act of January 28th, 1915, would be to supersede such jurisdiction as to this case. In the absence of the Act of 1915, the United States court would undoubtedly have had jurisdiction of this case under Section 24 of the Judicial Code, as one involving an amount exceeding $3,000.00, and arising under a law of the United States. If the charter constitutes a grant of jurisdiction the court likewise would have had jurisdiction *on that ground.* Either source of jurisdiction would have been all sufficient. We cannot assume that Congress by the Act of 1915 intended to strike down one source and leave the other completely efficient. This would have been a vain thing. The Act of 1915 must be construed as superseding *all* jurisdiction of the cases covered by it, regardless of whether such jurisdiction arose by grant in the charter, or federal question arising thereout. A discussion of the effect of the Act of 1915 is more appropriate under the next main subdivision of the argument, and we need only here refer very briefly to the theory on which the appellant suggests that the alleged charter jurisdiction survives the Act of 1915.

In this connection appellant invokes the rule that a general act does not ordinarily repeal an earlier special act, and asserts that if the grant of power to sue and be sued, as contained in the Railway Company's charter be treated as conferring jurisdiction, it re-

mains unaffected by the Act of 1915, for the reason the charter is a special law and the act of 1915 is a general law.

The rule invoked is elementary but it has no application here. Like all rules for the interpretation of statutes, its *only* office is to aid in the ascertainment of the legislative intent. If the intent is otherwise obvious the rule is without application, and in no case can it be applied to prevent the accomplishment of the purpose of the law making body. It is a fact, judicially known to this Court, *and uncontroverted*, that the Act of 1915 does not apply to any railway corporation except The Texas and Pacific Railway Company. It was aimed solely and directly at this Company and was introduced in Congress by Mr. Beall, representative from Dallas (Texas) district.

Representative Floyd, on behalf of the Judiciary Committee of the House, said, of the original bill (52 Cong. Record, 283) :

> " This bill was introduced by the gentleman from Texas (Mr. Beall) and *The Texas & Pacific Railway Company* operating in Texas was incorporated by Act of Congress and is the only road in the State of Texas that has the right to transfer its cases to the federal court on the ground that it was incorporated by Congress, thereby giving it an advantage over other railroad corporations operating in the State of Texas."

Senator Chilton, in reporting to the Senate an amendment to the House Bill, which amendment was adopted and is the present law, said (52 Cong. Record, 1544) :

> " The next amendment is to remedy the following situation : There is *one railroad company in the United States* that is incorporated under the laws of the United States, and that railroad company clogs the records of the Supreme Court by taking all of its cases to that court on the ground

> that as it is a corporation organized under the laws of the United States there arises a question under the laws of the United States."

The Senate report referred to by Senator Chilton contained the following (52 Cong. Record, 434–5):

> "It is believed that The Texas & Pacific is now the only railroad in this country which will be affected by this provision."

In light of this record, it is useless to invoke the canon of construction that a general does not ordinarily repeal a special act. In this instance the general law, so called, is special in fact, aimed solely at the corporation created by the special act, *and operative only as against that corporation.* An application in such a case of the rule invoked would accomplish the opposite of what it is intended to accomplish, and would nullify the Act of 1915, and leave it without subject matter upon which to take effect. But even assuming that the rule could be applied, the special act in this instance has been repealed within the requirements of the rule itself, because in the language of Mr. Justice BREWER quoted at page 34 of the brief of Appellant,

> "the provisions of the general are manifestly inconsistent with those of the special."

II.

Can jurisdiction be maintained by virtue of a federal question?

Answering appellant's contention that the trial court had jurisdiction of this case on the ground of the existence of a federal question notwithstanding the

act of January 28th, 1915, we submit the following propositions:

FIRST: The only federal questions that could arise on the face of the appellant's Bill of Complaint are such as would arise out of and be presented by an allegation that The Texas and Pacific Railway Company was "incorporated under an Act of Congress," and since the passage of the Act of January 28th, 1915, questions so arising, though "inherently" federal, are no longer sufficient to confer jurisdiction upon United States Courts.

SECOND: The Bill of Complaint discloses no actual dispute or controversy as to the meaning of an Act of Congress upon the determination of which the result of the suit depends.

AUTHORITIES.

Act of March 3, 1875 (18 Stat., 470); Act of March 3, 1887 (24 Stat., 552); Act of August 13, 1888 (25 Stat., 433); Act of January 28, 1915 (38 Stat., 803); 237 Judicial Code; *Butler vs. Shafer*, 67 Fed., 161; *Cooke vs. Avery*, 147 U. S., 375; *Fitzgerald vs. Missouri Pacific Railway*, 45 Fed., 812; *Gold-Washing Water Company vs. Keyes*, 96 U. S., 199; *Huff vs. Union National Bank*, 173 Fed., 333; *Herrmann vs. Edwards*, 238 U. S., 107; *Joy vs. St. Louis*, 201 U. S., 332; *Leather Manufacturers' Bank vs. Cooper*, 120 U. S., 778; *Lovell vs. Newman*, 227 U. S., 412; *McGoon vs. Northern Pacific Railway Company*, 204 Fed., 998; *Norton vs. Whiteside*, 239 U. S., 144; *Osborn vs. Bank of United States*, 9 Wheat., 738; *South Carolina vs. Virginia-Carolina Chemical Company*, 117 Fed., 727; *Shulthis vs. McDougal*, 225 U. S., 561: *Shoshone Mining Company vs. Rutter*, 177 U. S., 505; *Washington vs. Island Lime Company*, 117 Fed., 777; *Foster's Federal Practice*, § 24.

Argument.

The Act of January 28th, 1915, is :

> " No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress. '

In order that we may have a clear appreciation of the scope of this Act, it will be necessary to refer to the cases establishing the rule of decision it was the evident purpose of the act to *reverse.*

The doctrine that the powers exercised by a corporation created by act of Congress were called in question by every suit by or against such corporation, and therefore that each such suit involved a federal question, justiciable in a United States court, was first enunciated by Chief Justice MARSHALL in the case of *Osborn vs. Bank*, 9 Wheat., 738, before mentioned. In that case the question presented was as to the power of Congress to authorize the Bank of the United States to sue and be sued in the United States Circuit Courts. The power depended upon whether or not a suit by or against the bank arose under the laws of the United States.

The Chief Justice, answering this question in the affirmative, said (p. 823) :

> " We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.
>
> " The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to

acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that the charter is a law of the United States. It is not only itself the mere creature of law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law.

Take the case of a contract, which is put as the strongest against the Bank.

"When a bank sues, the first question which presents itself and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative the cause is determined against the plaintiff; and this question, too, depends entirely upon a law of the United States.

"These are important questions and they exist in every possible case."

* * * * * *

"The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves then, must determine its character, whether those questions be made in the cause or not."

The first case specifically involving the application of the principles laid down in the Osborn case,

to suits by or against railway corporations created by an Act of Congress, is reported as the *Pacific Railroad Removal Cases*, 115 U. S., 1, *Oct. Term, 1885*. That case involved the removal of suits brought in various state courts against the Union Pacific Railway Company, a corporation also chartered by Congress, and The Texas and Pacific Railway Company. Certain of the cases, upon removal, were remanded to the state courts on the ground that they did not involve a federal question. The Supreme Court of the United States reversed this ruling, Chief Justice WAITE and Justice MILLER dissenting, and held that the cases involved federal questions, in that the powers of the railways were derived from federal charters. This Court did not discuss the question at great length, but quoted and applied the language of Chief Justice MARSHALL in Osborn vs. Bank, above referred to.

The principle of the Osborn Case was well stated by Justice BREWER in delivering the opinion of this Court in *Shoshone Mining Company vs. Rutter*, 177 U. S., 505, *Oct. Term, 1899*, where it is said (pp. 509-10:

> "As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke the jurisdiction of the federal courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress (*Osborn v. Bank of the United States*, 9 Wheat., 738, *Pacific Railroad Removal Cases*, 115 U. S., 1.
>
> "The argument of Chief Justice MARSHALL in support of this was, briefly, that a corporation has no powers and can incur no obligations except as are authorized or provided for in its charter. Its power to do any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter

> is given by one of the laws of the United States *there is a primary question of the extent and meaning of that law.* In other words, *as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined, a suit by or against the corporation is one which involves the construction of the terms of its charter.* In other words, a question arising under the law of Congress."

Under these decisions, and the Act of March 3, 1875 (18 Stat., 470) ; the Act of March 3, 1887 (24 Stat., 552) ; the Act of August 13, 1888 (25 Stat., 433), and Section 24 of the Judicial Code, all suits by or against The Texas and Pacific Railway Company involving the necessary jurisdictional amounts, were cognizable, and numbers of them were actually tried, in the United States Circuit and District Courts, and numbers of them were brought to this Court for review.

In the judgment of Congress it was not wise that this should be permitted to continue, and its evident purpose was, by the Act of 1915, *so far as jurisdiction in United States courts was dependent upon the existence of a federal question,* to put The Texas and Pacific Railway Company upon an even keel with railroad corporations chartered under the laws of the states ; but to leave its right *otherwise* to resort to the federal courts unimpaired and unchanged. If by a confiscatory rate prescribed by a State Commission, the property of a state railroad should be taken without due process of law, it could, presenting this federal question, resort to the United States courts for redress and to exactly the same extent could resort be had by The Texas and Pacific Railway Company to such courts. It could resort to said courts in any case involving a federal question arising *otherwise* than *out of its congressional charter,* that is, otherwise than, " upon the ground that said railroad company was incorporated under an Act of Congress."

The contention is made that the purpose of the act of 1915 was to deprive the federal courts of jurisdiction in cases where such jurisdiction was based *solely* on the *fact* that The Texas and Pacific Railway Company was created by an act of Congress, and a distinction is sought to be made between jurisdiction arising from the *mere fact* of incorporation by Congress, and that arising out of the potential necessity, in all cases, of interpreting and applying the powers granted by Congress in the act of incorporation.

This distinction was the burden of appellant's contention in the Court below. It did not find favor with the learned District Judge, and his position thereon, which seems to us unanswerable, is clearly stated in his memorandum opinion set out at length on pages 139–142 of the transcript, to which we invite careful attention.

We confess an inability to grasp the distinction, and confidently assert it does not, and in the nature of things cannot, exist. Not only does it not exist, but its existence would be wholly inconsistent with the Osborn case, the plain effect of which is, that a suit by or against a federal corporation raises a federal question *only* because it necessarily involves a consideration of the extent and effect of its corporate powers.

The act of 1915, in light of the circumstances out of which it arose, is not obscure or difficult of construction :

> "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

The first part of the sentence is too plain for discussion, "No court of the United States shall have jurisdiction of any action or suit *by* or *against* any railroad company."

This of necessity includes the United States District Courts and it includes all suits *brought by* the railroad company and all suits *brought against* it. The language could not be plainer. Appellant in the trial court conceded that the act could not be restricted to removable suits. Its brief in this Court indicates that it should be so restricted. Congress understood that suits brought *by* The Texas and Pacific Railway Company could not be removed, and yet, in unmistakable language, it took away jurisdiction in suits brought *by* as well as *against* the company. If we restrict the act to removal suits, we *must* strike from it the words "by or" and thereby completely nullify *one-half* thereof. By no permissible interpretation can the act be so mutilated.

While the meaning of the latter part of the act of 1915, that is, "upon the ground that said railway company was incorporated under an act of Congress," is plain, the language is not exact. No court of the United States has ever had jurisdiction, and could not under the Constitution have jurisdiction, of a suit by or against a railroad company, "upon the ground that said railroad company was incorporated under an Act of Congress." This statement may be verified by referring to the Judiciary Acts. But Congress has the power under the Constitution to confer jurisdiction upon the federal courts of all controversies "arising under the laws of the United States," and in all judiciary acts since and including that of 1875 it has specifically vested jurisdiction in the federal court of all such controversies within prescribed amounts. Under these acts, suits by and against federal corporations have been entertained in the United States courts, but in all such cases said courts took jurisdiction because the cases arose "under a law of the United States," *and for no other reason whatsoever.* This is true in respect of all the cases cited by the appellant, involving The Texas and Pacific Railway Company. As this Court had established the doctrine that a corporation chartered by Congress could not

by any possibility have any litigation that did not involve the construction and effect of its charter, it of necessity became axiomatic that a corporation created by Congress could not have any litigation that did not involve a *federal question.* Therefore, an allegation that a corporation, plaintiff or defendant, was incorporated by an Act of Congress, was the exact legal equivalent of an allegation that the given case "arose under the laws of the United States"—involved a federal controversy—to wit, the construction and effect of a congressional charter.

And it thus became the universal practice, when The Texas and Pacific Railway Company was sued, and when grounds of jurisdiction were being stated in opinions of courts, for the pleader or the judge to state that jurisdiction was predicated upon the fact that the company "was incorporated under an Act of Congress," and there stop. By this brief formula, having a stereotyped legal significance, approved by repeated decisions, the existence and extent of the federal question were fully and accurately set forth.

Does not the language "upon the ground that said railroad company was incorporated under an Act of Congress" plainly manifest the purpose of Congress to take away from United States Courts jurisdiction dependent upon all such federal questions as were raised and presented by the allegation that the corporation, plaintiff or defendant, "was incorporated under an Act of Congress?" Can it by any possibility be construed to mean less than this? We submit that it cannot, and that the jurisdiction taken away from the United States courts by the act of 1915 is *co-extensive* with the federal questions held by this court in the Osborn case and those following it, to have arisen and to have been tendered in issue, by the allegation of the existence of a federal charter.

So far, and to the exact extent, that the allegation of a federal charter, in suits by or against The Texas and Pacific Railway Company, raised federal questions, just so far, and to that exact extent, does the act of

1915 destroy the *jurisdictional quality* of such questions.

The Act of 1915 was intended to strike down for jurisdictional purposes the inherent and ever present federal questions which under the decisions of this court in the Osborn and subsequent cases had been treated as raised and tendered in all suits by and against federal corporations by the mere allegation of the existence of a federal charter. We may assume it was not intended to go beyond this, but certainly it was not intended to stop short of it, and to leave an undefined territory in which a federal question would be raised by the allegation of the existence of a federal charter, which question, nevertheless, would *not* be encompassed by the Act.

Reduced to its last analysis, the case simply is, what questions are raised by the allegation of a federal charter? Let the mind revert to the language of Chief Justice MARSHALL in the Osborn case, or to the language of Justice BREWER in the Shoshone case, and the question is easily answered. The allegation that a corporation is created by an act of Congress, advises the court that the Act of Congress must be considered in order to determine whether the corporation has the right to sue, and this being determined, whether or not under its charter powers it had the right to make the particular contract sought to be enforced. It may be that, as in the suit at bar, the pleader *unnecessarily* sets forth the powers of the corporation, or it may be that no allegation is made other than that the corporation is created under an act of Congress. The legal effect, however, of these allegations is precisely the same, as this Court takes judicial cognizance of the fact that The Texas and Pacific Railway Company was created by an Act of Congress, and takes judicial cognizance of every syllable of the Acts of Congress creating it.

Our views as to the scope and effect of the Act of 1915 may be accentuated by the following illustrations:

John Doe sues The Texas and Pacific Railway Company for a personal injury, alleging that he is a resident of Dallas County, Texas, and that defendant is a railroad company "incorporated under an act of Congress," having an agent in Dallas County. Under the doctrine of the Osborn Case this allegation would raise and tender an issue as to the construction and effect of the Company's charter and would bring into question the rights, powers and duties of the corporation thereunder. Will any one deny that the jurisdiction of a suit such as this was taken away from the federal courts by the Act of 1915? We think not. Yet will any one deny that the allegation raised and tendered in issue a federal question? Surely not.

The case we have put involves a *tort*. Let us illustrate with a suit in contract.

John Doe sues The Texas and Pacific Railway Company to recover the contract price of 50,000 cross-ties sold and delivered to the company, or to recover the price agreed to be paid for constructing 10 miles of main line, alleging in either case that the Railway Company "was incorporated under an Act of Congress." This allegation would raise a federal question, to wit, the right and power of the Company under its charter, in the one case to make a contract to purchase and pay for cross-ties, and in the other case to make a contract for the construction of a portion of its railways. The questions thus presented are most distinctly federal under the Osborn case, and they would be raised by the mere allegation of a federal charter, just as in the *tort* case mentioned. Has the federal court jurisdiction of such controversies as those last mentioned? Or was the jurisdiction taken away by the Act of 1915? Manifestly it was taken away in such cases, if taken away in the first case mentioned. The jurisdictional allegation in both cases is exactly the same, the federal questions presented and tendered *and susceptible of being actually litigated* a e precisely the same. If the Act of 1915 covers the first, there is no possibility of excluding from its operation the second.

Again, John Doe sues The Texas and Pacific Railway Company to obtain a judgment on bonds issued by said company, and to foreclose a mortgage securing them. He alleges that The Texas and Pacific Railway Company is a corporation "incorporated under an act of Congress"—and stops. As in the other cases put, the court judicially knows every syllable and line of the charter of The Texas and Pacific Railway Company, and its powers thereunder, and gives them t e same consideration and effect when not alleged as when alleged. In this case, as in the first, involving a tort, a federal question is raised and tendered; the construction and effect of the charter is in issue. Does the Act of 1915 apply to this last case? If not, why not? The pleading raising the jurisdictional question is in the exact language put in the other cases. It is in the language used by John Doe when he sued for tort—in the language used by John Doe when he sued upon contract. The same jurisdictional allegation is of necessity bound to tender and present to the defendant, for actual controversy, if he likes, the same federal questions. Things equal to the same thing must of necessity be equal to each other.

If the Act of 1915 applies in the first case, why does it not apply as well to the last? If it applies to the second, why not to the third? If it applies to one, why does it not apply to all? Is not the conclusion irresistible that if it applies to one it applies to all, and that if it does not apply to all it does not apply to any? And if it does not apply to any it is nugatory and a farce. If we do not include or exclude all, where shall we draw the line? Shall we include cases of the first and second classes and exclude those of the third? Or exclude those of the second and third, and include those of the first? And upon what principle?

The obvious answer to all these questions is that the federal questions tendered in each case, whether the defendant avails itself thereof and converts them into "actual" controversies or not, are the same, and that under the allegations supposed an issue is tendered as

to the construction and effect of the charter—not one part of it rather than another, *but every part thereof.* That the Act of 1915 was intended to deprive of jurisdictional force the questions so arising *out of the charter* seems certain almost to the point of demonstration, in light of the principles announced in Osborn's case.

Appellant's first proposition on page 41 of its brief, to the effect that there exist in this case federal questions giving rise to federal jurisdiction, *unless* such jurisdiction has been taken away by the act of 1915, is correct. We not only concede this, but we will go further and admit that the *same* federal questions are now presented in cases by or against The Texas and Pacific Railway Company as were presented before the Act of 1915. All we contend for is that *such* federal questions, in light of the Act of 1915, are no longer, under the fiat of Congress, sufficient to confer jurisdiction on United States Courts.

Appellant seeks to draw a distinction between "real" and "constructive" federal questions. It admits that the Act of 1915 supersedes jurisdiction arising from the latter, but not the former.

Appellant prudently refrains from defining "real" or "constructive" nor does it state the difference between them, but it probably uses the term "real" as meaning "actual" and "constructive" as opposed to "actual" that is, existing only in legal contemplation.

The distinction claimed has no legal existence; any federal question is a real federal question. If it is not real, it is unreal, fictitious. There is no such things as a constructive federal question, that is, one existing only in legal contemplation, and not susceptible of being *by the defendant* developed into an actual controversy.

The principle is firmly imbedded in the jurisprudence of this Court, that a federal question, in order to confer jurisdiction, must appear on the face of the plaintiff's complaint, and that it cannot be shown by the defendant's answer. Not only this, but such question must

appear from the allegations *necessary* to set forth the plaintiff's case, and it cannot be deduced from the statement by the plaintiff of *unnecessary* matter. As a corollary it follows that it cannot be shown by matter alleged by the plaintiff in anticipation of defendant's supposed federal defense, for defendant may not make such defense.

This pr mise being established it follows that "real" or "constructive" cannot be predicated of any federal question in this connection. Jurisdiction exists when the plaintiff's complaint is filed, or it never exists. The federal question then arises, or it never arises. It must *then* be real. in the sense of an *actual existence*, or it never will be real. While it must be real, it need not be *active*. Until the defendant answers it can never be known what the active, actual controversy will be. Until that time it can never be known that the federal *question* will ripen into a federal *controversy*,—that the dormant will become quick. But the question presented by the plaintiff must always and in every case be such that the defendant may, if he likes, convert it into an actual live controversy. Therefore, a 'constructive" federal question is logically impossible.

The federal questions raised in the numerous Texas and Pacific Railway cases referred to by appellant, and determined in this and the inferior federal courts, spoken of by appellant as "constructive", were not less real than they would have been had there been in each of those cases a heated controversy as to the validity or effect of some part of the charter of the railway company, or the whole of it. The only warrant that appellant has for speaking of the questions raised as "constructive", is that in point of fact the litigation was finally concluded *without any actual controversy having arisen concerning the charter*. But this was because the parties to said suits did not see fit to make an issue with reference to the charter, or any of the powers thereby conferred. Had they done so, presumably appellant would classify the federal questions so litigated as "real" and not

" constructive "; yet, the federal questions would in either event, have been precisely the same.

In the case at bar the plaintiff *has not suggested in its Bill of Complaint that there is or can be any question as to the validity, construction or effect of the act of Congress creating The Texas and Pacific Railway Company,* nor has the railway in its answer raised any question as to the validity, construction or effect of said Act, and presumably there is not and will not be any controversy whatsoever on these points. Why, therefore, are not the questions presented " constructive " rather than " real "—to use appellants' classification? If at the conclusion of this litigation it should develop that no question as to the validity, interpretation or effect of the company's charter had been raised or determined, would appellant classify the federal questions as " real " or " constructive "? and wherein would be the difference in such event between this case and the numerous Texas and Pacific cases that have gone before?

The Act of 1915 makes no distinction between federal questions. If they arise *out of i. e.* because of the federal incorporation of the company they cease to be jurisdictional in *all* cases, whether they be termed, real, constructive or inherent. Under said act they cease to be jurisdictional in cases in which the defendant may precipitate the most lively contest as well as in cases where no such contest results. All that transpires subsequent to the filing of the bill is wholly immaterial, and cannot give complexion to the jurisdictional situation, which is fully and *finally* determined by what appears on the face of the bill *when it is filed.*

Following its classification of federal questions as " real " and " constructive " appellant asserts that the case in question involves a " real " as opposed to a " constructive " federal question, that is, that " a suit to enforce a railroad mortgage given by a federally chartered company necessarily involves one or more federal questions that are not merely constructive in their character." The " real " question is claimed

to arise from the fact that the suit is to enforce bonds and a mortgage securing them, authorized by the federal charter of the company. As previously stated there is not a suggestion that there is or will be any controversy whatsoever as to the validity of the charter or its meaning or effect. The only real controversy suggested is one involving the interpretation of the *contract* of mortgage, and the *facts* relative to the earning of income thereunder.

By asserting that this situation presents a real federal question appellant can only mean that there inherently exists a federal question, because of the *source* from which the powers of the corporation eminate, and that perforce of this orgin it will be necessary in the course of the litigation to construe and apply an act of Congress. This is all that it can mean, and yet these very questions may all arise—and are all potentially existent and presented—in every suit against a federal corporation, and are *affirmatively* set forth by an allegation of the existence of a federal charter. We thus, no matter from what point we start, get back to Osborn's case, which completely includes all federal questions, no matter with what adjectives they may be qualified, and whatever is included in Osborn's case is likewise included in the act of 1915, and for jurisdictional purposes made *nil*.

Appellant must take one of two positions. It must deny that the existence of a federal charter raises federal questions to the *extent* stated by Chief Justice MARSHALL in the Osborn case, or it must deny that the act of 1915 destroys the jurisdictional effect of *any* federal question; be it deemed "real" or "constructive." It cannot admit, without destroying its position, the full scope of the rule of the Osborn case, and at the same time admit that the Act of 1915 eliminates *any* federal question. If the doctrine of Osborn's case is correct, the Act of 1915 covers all questions arising out of the federal charter powers of the corporation, whether they be designated "real" or "constructive."

Appellant asserts an analogy between the Act of January 28, 1915, and the various Acts of Congress relating to the jurisdiction of the United States court over suits by or against national banks, which acts in substance convert national banks into state corporations, but which do not otherwise deprive them of the right to resort to federal courts in cases involving federal questions.

The Act of 1915 does not attempt to convert The Texas and Pacific Railway Company into a state corporation, but simply to strike down all such federal jurisdiction as grows out of the fact that its powers are derived from a Congressional charter. Outside of its charter, it has precisely the same right, as has been stated, to resort to the United States courts in controversies involving federal questions, as any other corporation or individual. No one would contend, for example, that The Texas and Pacific Railway Company could not sue or be sued in the federal courts, notwithstanding the Act of 1915, in a case involving the validity, construction or effect of the Interstate Commerce Act, or any one of the numerous general laws of the United States bearing upon railway companies.

With one exception, an examination of the Bank cases cited, will show that as to those passed upon by this court the question for determination involved *diversity of citizenship only.* The others come from either the Circuit Court of Appeals or the trial court, and are cases where the court was simply applying some *general statute of the United States applicable to all banks* and was in no sense attempting to apply an act which was a part of the specific charter of the bank. The exceptional case is *Leather Manufacturers' Bank vs. Cooper*, 120 U. S., 778, *October Term, 1886*, a suit instituted by Cooper against the Bank in a state court of New York to recover a balance of account. The Bank removed the suit to the circuit court of the United States on the ground of its being a national bank and that consequently the suit was one

arising under the laws of the United States. Motion to remand was granted, and upon a writ of error this court held, citing the various national banking acts, that the cause was not removable. No diversity of citizenship existed, and no right of removal existed by virtue of defendant being a national bank; therefore, it followed that the only federal question that could have arisen would have been one involving the power of the bank to create the indebtedness upon which suit was brought. We refer to this case as illustrating the proposition that the mere fact that in a suit some power granted by a federal law may come in question, does not of itself give rise to federal jurisdiction and as negatively deciding the contrary of what was held by the District Judge in the Bowers case, referred to on page 49 of appellant's brief. In the other cases, from inferior courts, the banks, by virtue of an Act of Congress, were to be treated as citizens of particular states, and the acts to be applied, and of necessity interpreted, were *general laws of Congress.*

The language of the Acts relating to national banks, is so unlike the language of the Act of 1915, as to make authorities under the one wholly inapposite in a discussion of the other.

Appellant suggests on page 52 of its brief that the validity and effect of the various provisions of the mortgage and bonds sued upon must be determined with reference to the Acts of 1873 and 1874, which it says are not Acts incorporating The Texas and Pacific Railway Company, but only supplementary thereto. The distinction is without merit. The charter of The Texas and Pacific Railway Company consists of the various Acts of Congress giving it life and endowing it with capacities. An Act amending its original charter seems to be conceded to be the law of its being, but an act "supplemental" to the charter is claimed to be otherwise. An Act supplemental to the charter becomes a part thereof as much as though it had been included therein originally, or inserted therein by amendment. The principles to be applied in this case

are precisely the same as if the charter of the Texas and Pacific Railway Company consisted of one instrument, never amended or supplemented.

While we are convinced the foregoing interpretation of the Act of 1915 is correct, we submit, if it is to be construed as distinguishing between federal questions, eliminating some and not others, that appellant's classification is incorrect, and that discrimination should be made between federal questions directly presented and which *must be decided*, and those which, though existent, are collateral and necessarily determinable *only* in the event they are raised and insisted upon by the defendant and the Act construed as applying to the latter but not to the former.

It is settled by numerous decisions of this Court, found in practically every volume since *Gold- Washing Water Company vs. Keyes*, 96 U. S., 199, October Term, 1877, that a suit does not arise under the laws of the United States so as to confer original jurisdiction on federal courts *unless it really* and *substantially* involves a dispute or controversy as to the validity, construction or effect of a law of the United States, *upon the determination of which the result depends.* (*Shulthis vs McDougal, 225 U. S., 561; Lovell vs. Newman, 227 U. S., 412; Hull vs. Burr, 234 U. S., 712; Norton vs. Whitesides*, 239 U. S., 144).

It is also settled under the authorities of this and the inferior federal courts that it is essential to the existence of a federal question sufficient to give the United States courts original jurisdiction, that the validity, construction or effect of the Constitution or an Act of Congress be *directly* in issue. (*South Carolina vs. Virginia-Carolina Chemical Company, 117 Fed., 727; Washington vs. Island Lime Company, 117 Fed., 777; Cooke vs. Avery, 147 U. S., 385; Joy vs. St. Louis, 201 U. S., 434*).

From the foregoing it follows that the fact that in a suit it *may* be necessary to construe or give effect to an Act of Congress, does not give rise to a federal

question sufficient to confer original jurisdiction upon United States courts *(Water Company vs. Keyes, 96 U. S., 199; Butler vs. Shafer, 67 Fed., 161; Fitzgerald vs. Missouri Pacific, 45 Fed., 812; Leggett vs. Great Northern Railway Company, 180 Fed., 314; Foster's Federal Practice, 5th Edition, Vol. 1, § 24).*

And again, it is firmly established that a suit to enforce a right which takes its *origin* in the laws of the United States, is not necessarily, and for that reason alone, one arising under those laws *(Water Company vs. Keyes, 96 U. S., 199; Shoshone Mining Co. vs. Rutter, 177 U. S., 507; Shulthis vs. McDougall, 225 U. S., 569; Lovell vs. Newman, 227 U. S., 420).*

Under the foregoing decisions a plaintiff, in order to maintain original jurisdiction in the federal courts, must in his bill set forth a real and substantial controversy directly involving the validity, construction or effect of an Act of Congress, upon which the result of the suit must depend.

As before stated, there is not a suggestion of question or controversy on the face of appellant's Bill of Complaint as to the validity of the charter, as to its interpretation, or as to any act done under it. The charter is asserted to be valid, and everything done under it in strict conformity thereto. There is no suggestion of question as to the validity, interpretation or effect of the charter to be found within the four corners of the defendant's answer, appellant's assertions to the contrary notwithstanding. But why bother with the answer when it has nothing to do with the question?

It may be conceded that a "real and substantial controversy" is always presented where the action is based *directly upon* or *directly grows* out of a federal statute, for example, a suit to enforce any statutory cause of action, as a marshall's bond. As illustrative, see the discussion in the case of *McGoon vs. Northern Pacific Railway Company, 204 Fed., 998.* The national bank cases of *Walker vs. Windsor and Huff vs. Union National*, cited by appellant on pages

49-51 of its brief, are of this character and were to enforce *directly* a federal statute. A question in cases *directly* involving a federal statute may be classed as actual, because the court in all such suits *must* apply the statute to the facts of the case in order to reach a judgment, and it *cannot* do this without going through the mental process of construing it.

But the case at bar is essentially different from cases of this character. The suit is not to enforce a statute, or a statutory right or cause of action. It does not grow *directly* out of a statute. It is to enforce a bond and mortgage executed, it is true, under authority of a federal charter, but it does not call, except indirectly, and then only at the instance of defendant, for the interpretation of a federal law. At most its *origin* is in a federal law, but that fact does give this Court jurisdiction—does not necessarily raise a federal question.

A suit involving land granted by United States patent under an Act of Congress has been held, time and again, in cases remote and recent, not to give rise to a federal question sufficient to confer original jurisdiction upon the United States courts. The Acts of Congress authorize the issuance of patents; the patents are issued by a United States officer, in pursuance of that authority; they furnish the only title of the patentees; and yet it is uniformly held when such patentees assert title under them, that a federal question is not presented. The origin of the right is a federal statute, but there is no real and substantial controversy as to its validity, meaning or effect unless it be raised by the defendant, and in such event the questions raised would not confer original jurisdiction upon the United States courts, but would have to be brought to this Court through the state courts of last resort under Section 237 of the Judicial Code. One of the most recent cases upon this point and one of the strongest is *Shulthis vs. McDougall*, 225 U. S., 269, to which we respectfully direct the Court's attention.

The analogy between these land cases and the suit in question seems in principle perfect. If the land suit does not present a real and substantial federal controversy it is difficult to see how a suit to enforce the bonds and mortgage in question, can present one. In each case the right asserted goes back to a federal statute—has a federal origin, but in neither case is a federal statute directly or necessarily in controversy.

A suit to cancel a patent because not issued in conformity with the Act of Congress authorizing patents would unquestionably be a suit directly involving a federal question cognizable by original proceeding in the federal courts. *In such case a construction of the laws of Congress could not be avoided.* They would be directly and necessarily in issue, and the court in order to reach a judgment would of necessity have to consider and apply them, even though the plaintiff and defendant might agree as to what they meant.

If the Act of 1915 is to be denied its logical effect under the Osborn case, why may not the rule above suggested be applied, and original jurisdiction be permitted to United States courts in cases *directly* and and *necessarily* involving the validity, construction and effect of the Company's federal charter, leaving all other questions thereunder to be raised and litigated in the state courts, and brought, if necessary, to this court therefrom under Section 237 of the Judicial Code.

See *Herman vs. Edwards, 238 U. S., 112.*

We do not mean to say that this is the proper construction of the Act of 1915; we insist that it is not, but it is the only construction which can be adopted, in light of such decisions as *Shulthis vs. McDougal*, if the Act is to be construed as covering certain, but *not all* of the Federal questions coming within the scope of the principle and the language of Osborn's case.

III.

Can jurisdiction be maintained on the ground of diversity of citizenship?

Answering the contention that jurisdiction can be maintained on the ground of diversity of citizenship Railway Company submits:

FIRST. That the Bill of Complaint fails to allege diversity of citizenship.

SECOND. That if the Railway Company is for jurisdictional purposes to be deemed a citizen of any State —which we dispute—it is not a citizen of Texas, but a citizen of New York.

AUTHORITIES.

Act of March 3, 1887 (24 Stat., 552). *Abercrombie vs. Dupuis*, 1 Cranch, 343; *Bingham vs. Cabot*, 3 Dall., 382; *Brown vs. Keene*, 8 Pet., 112; *Ex parte Dunn*, 212 U. S., 374; *Dade Coal Company vs. Haslett*, 10 S. E., 435; *Grace vs. American Central Ins. Co.*, 109 U. S., 278; *Hanford vs. Davies*, 163 U. S., 273; *Jossey vs. Georgia Railroad Company*, 28 S. E., 283; *National Park Bank vs. Nichols*, 4 Bissell, 315; *New Orleans vs. Winter*, 1 Wheat., 91; *Texas and Pacific Railway Company vs. Interstate Commerce Commission*, 162 U. S., 197, 57 Fed., 948.

Argument.

An examination of the allegations of the Bill leads us to the conclusion that at the time the Bill was prepared and filed it was not then in the mind of the pleader that jurisdiction would be invoked by reason of diversity of citizenship. In the first place, as shown by the allegations of the Bill, it is specifically alleged that the Complainant, to-wit: the Bankers Trust Company, is a citizen of

the State of New York. It is, likewise, specifically alleged that defendant The New Orleans Pacific Railway Company is a citizen of the State of Louisiana. As to The Texas and Pacific Railway, complainant was content to allege that said corporation is created under the laws of the United States and, further, that it has its principal place of business, and principal operating and general offices in the City of Dallas, Texas, this being followed by an allegation that the said The Texas and Pacific Railway Company is a *resident* and *inhabitant* of the Dallas Division of the Northern District of Texas (Tr., 23).

It thus appears that the Complainant, for some reason, avoided any allegation that the Texas and Pacific Railway Company is a *citizen* of the State of Texas or any allegation that it *is not* a citizen of New York.

In *Hanford vs. Davies*, 163 U. S., 273, *Oct. Term, 1895*, Mr. Justice HARLAN stated (p. 279) :

> " It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears ; and, that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive."

Citing *Brown vs. Keene*, 8 Pet., 112 ; *Grace vs. American Central Insurance Company*,, 109 U. S., 278–283, and other authorities.

Again he says :

> " These principles have been applied in cases where jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship."

In *Grace vs. American Central Insurance Company*, 109 U. S., 278, *October Term, 1883*, the suit was commenced in the State Court of New York and thence removed, on the petition of the defendant, to a federal court. Complaint filed in the state court showed that the firm of Grace and Company, composed of William R. Grace, Michael P. Grace and Charles Flint, was doing business in New York, and that William R. Grace and Charles Flint were residents of that state. Petition for the removal of the cause showed the defendant was a corporation of the State of Missouri and alleged that William R. Grace and Charles Flint resided in New York, and that Michael P. Grace was a resident of some state or country unknown to defendant, but other than the State of Missouri. After stating these facts Mr. Justice HARLAN, speaking for this Court, said (p. 284):

> "The record, however, fails to show of what state the plaintiffs are citizens. They may be doing business in and have a residence in New York without necessarily being citizens of that state. They are not shown to be citizens of some state other than Missouri."
>
> Citing *Bingham vs. Cabot*, 3 Dall., 382.
> *Abercrombie vs. Dupuis*, 1 Cranch, 343, and other authorities.

And continuing further says:

> "It is true that the petition for removal, after stating the residence of the plaintiffs, alleges 'that there is and was, at the time that this action was brought, a controversy therein between citizens of different states,' but that is to be deemed the unauthorized conclusion of the law which the petitioner draws from the facts previously averred. Then there is the bond given by the defendant on the removal of the cause, which recites the names of the firm of Wm. R. Grace

& Co., and describes it to be as of the County of Kings and State of New York. If that bond may be considered as part of the record for the purposes of ascertaining the citizenship of the parties, the averment that the plaintiffs are 'of the County of Kings and State of New York' is insufficient to show citizenship."

A person may be a citizen of the United States and not a citizen of any particular State.

New Orleans vs. Winter, 1 Wheat., 91.
Feb. Term, 1816.

Reference is made to *Ex Parte* Dunn, 212 U. S., 374. That was a suit originating in the state court of Dallas County, Texas, and removed to the United States Circuit Court within the Northern District of Texas, and sitting at Dallas. The plaintiff contended that the Railway Company was an inhabitant of New York, and therefore could not have been originally sued in the Northern District of Texas, and urged the point that the case was not properly removable because the United States Circuit Court for the Northern District would not have had original jurisdiction. The Court, after reciting the facts shown, to-wit; that the Company maintained an office in Dallas County, Texas, and that the senior Vice-President lived there, and that, for many years, the Company had designated Dallas as its general office, held that the defendant company was liable to suit in the Northern District. No complaint is made of that decision, and it has no weight in the case at bar. The Circuit Court of the United States at that time had jurisdiction by virtue of the suit being one "arising under the laws of the United States."

As will be seen from a reading of the case, the question as to whether The Texas and Pacific Railway Company was a *citizen* of the State of Texas, was not involved and was not considered. It necessarily was conceded in the said case that by virtue of the Act of 1875 and acts amendatory thereto, a suit against The

Texas and Pacific Railway Company was a suit arising under the laws of the United States and some proper circuit court of the United States had jurisdiction. The question was whether the venue could be placed within the Northern District of Texas and sitting at Dallas, Texas. Certain acts of Congress divide Texas into various judical districts and certain acts of Congress prescribe where a defendant, in cases where the court has jurisdiction, may be sued.

It was held that a circuit court of the United States had original jurisdiction of the particular case and the only inquiry was whether such jurisdiction could be enforced within the Northern District of Texas. It was a question of venue alone and the court did not have to declare or even consider whether or not The Texas and Pacific Railway Company was a citizen of the State of Texas.

The case of *The Texas and Pacific Railway Company vs. Interstate Commerce Commission* (57 Fed. Rep., 948), is more in point. This suit was brought by the Interstate Commerce Commission against The Texas and Pacific Railway Company in the Southern District of New York under a statute which gave the Interstate Commerce Commission the power to sue either in the district where the alleged violation of law was committed or in the district where the defendant had its principal office. Jurisdiction of the suit against The Texas and Pacific Railway Company in the federal court within the Southern District of New York was maintained upon the ground that the railway company had its principal office in the City and State of New York. We quote from the decision:

> "This petition was brought in the Southern District of New York upon the ground that the principal office of the defendant (The Texas & Pacific Railway Company) was in New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the company shall be. In fact the stockholders meet-

> ings and directors meetings are held in New York where also is the office of the President, Vice-President, Secretary and Treasurer of the company and where the stock certificate books and records of the stockholders and directors meetings are kept. The New York office is thus the domicile of the corporation and the principal office, while the general or administrative office, of the heads of departments are in Texas."

The court thus holding that the principal office and domicile of The Texas and Pacific Railway Company was in New York although it had a general administrative office in Texas, held jurisdiction to be maintained in the New York court. Upon appeal to the Supreme Court of the United States this was affirmed. (*The Texas und Pacific Railway Company vs. Interstate Commission*, 162 U. S., 204).

The incorporating act of The Texas and Pacific Railway Company provided that the Board of Commissioners should perfect the organization and meet in the City of New York within ninety days after the passage thereof and the books should be open for the subscription of capital stock and the annual meeting of the stockholders should take place as provided in the by laws of the company. In other words, the original incorporating act expressly provided for the beginning of its business affairs in the City of and State of New York. If therefore there be any force in the reasoning of appellant herein to the effect that a federal corporation is to be treated as a citizen of a state wherein it is *domiciled*, the line of reasoning would necessarily lead to the conclusion that the Texas and Pacific Railway Company, under the facts, is a citizen of the State of New York. As the appellant is shown by its pleadings also to be a citizen of the State of New York federal jurisdiction is at once ousted.

If diversity of citizenship is relied upon in the light of the facts shown by the pleadings as well as those of

which the Court must take judicial knowledge, is not appellant bound to show in specific terms that the suit is the between citizens of different states; is it not bound to allege and show that The Texas and Pacific Railway Company is not a citizen of the State of New York.

It will be noted that complainant was very careful to state that it is a citizen of the State of New York and that the New Orleans Pacific Railway Company is a *citizen* of the State of Louisiana, but the allegations with reference to The Texas and Pacific Railway Company were expressly guarded in that the allegations are that The Texas and Pacific Railway Company is a *resident* and *inhabitant* of the Dallas Division of the Northern District of Texas and it expressly omitted any allegation that The Texas and Pacific Railway Company was a citizen of the State of Texas. Again, in Paragraph 4 of the Bill, jurisdiction is asserted upon the ground that federal jurisdiction was conferred in express terms by the terms of the Act of the Incorporation and in Paragraph 36 it is expressly averred that the suit is one of a civil nature in equity involving an amount in excess of Five thousand Dollars ($5,000), and that the suit "arises under the Constitution and Laws of the United States." Nowhere in said bill is there any allegation that The Texas and Pacific Railway Company is a *citizen* of the State of Texas or that the District Court of the United States for the Northern District of Texas has jurisdiction of the cause by reason of the same being a suit between citizens of different states. Are we not irresistibly led to the conclusion that there was some method on the part of counsel for appellant in so studiously avoiding the issue as to whether or not The The Texas and Pacific Railway Company is a citizen of the State of Texas and whether or not it is a citizen of the State of New York. The Texas and Pacific Railway Company by virtue of the terms of its charter could as well have its principal place of business

in the City of and State of New York or elsewhere. It could as well carry on and transact its business so that if the law in any way could make it a citizen of any state, it could be considered a citizen of the State of New York where its principal offices are situated, where its Board of Directors meet and where its general affairs are conducted, rather than the place of the general or administrative office of the heads of de-departments.

In *Dade Coal Company vs. Haslett* (Ga. 10, S. E., 435) it appears that a mining company had located its offices in a certain city and county for the purpose of electing its officers and conducting its affairs. It had its operating offices in another county. A suit against the company in the county where it maintained its office for the election of officers and for conducting its financial affairs, was held to have been properly brought. In *Jossey vs. Georgia Railroad Company* (28 S. E., 273), the Supreme Court of Georgia drew a clear distinction between the principal office of the company and the administrative office. In other words, drew the same distinction as was done in the case of *The Interstate Commerce Commission vs. The Texas and Pacific Railway Company* (57 Fed. Rep., 948).

In the argument for appellant (Brief, pp. 60, 61, 62) reference is had to certain circuit court decisions to sustain the proposition that a national bank, although created by an Act of Congress, was treated and considered a citizen of the state in which it was located. These cases were rendered prior to the Act of 1887 (24 Stat., 552), in which it was provided that national banks, for the purposes of suits by or against them * * * should be deemed citizens of the states in which they were respectively located. It is evident this line of authority is cited to sustain the proposition that by similar reasoning The Texas and Pacific Railway Company, a federal corporation, should likewise be considered a citizen of the State of Texas where it is alleged to have had certain offices. While we do not concede the

correctness of the decisions cited nor accept them as final authority, yet a broad distinction between such federal corporations as a national bank and The Texas and Pacific Railway Company, a railway corporation, is to be noted.

The place of business of a national bank is confined by the terms of the law to some particular town or place in some particular state. It has no authority to have or establish any office at any other place whatsoever. It therefore follows that whatever weight is to be given to the decisions referred to by appellant must be considered in the light of the various national banking acts. In other words, by virtue of the said acts the principal office, residence and domicile of such banking association are necessarily fixed and confined to a particular state and in a particular location.

The reason of the decision holding that for purposes of jurisdiction national banks should be deemed citizens of the state in which they are established, is well stated in the case of *National Park Bank vs. Nichols*, 4 Bissell, 315 (1869), where Mr. Justice DAVIS sitting at Circuit said (pp. 315–6):

> "So far as the right to sue is concerned, it can make no difference that the bank is authorized by Congress instead of the Legislature of New York. If it is created by law, has its lawful place of business in New York and *nowhere* else and its corporators are citizens of the state, it can bring a suit in any circuit court of the United States outside of the State of New York. * * * There is no question but the Park Bank was authorized by Congress to transact business in New York and nowhere else and it therefore follows, as a legal presumption, that the shareholders of the bank are citizens of New York."

This is not true of The Texas and Pacific Railway Company. As hereinbefore recited, it has established

its principal office and domicile in the State of New York, which action is not contrary to the Act under which it was incorporated, nor of any law of the United States. It has the power to establish and maintain operating offices in the different states through which its line of railway extends.

Upon what principle can it be held to be a citizen of the state of Texas? Does it derive its corporate power from such state? Is it confined to the exercise of its corporate powers to the state of Texas? Can the state pass any law or procure any judgment through its courts by which charter could be forfeited? Then, again, if a citizen of Texas, why is it not a citizen of Louisiana for the same reasons? If a citizen of Texas, why is it not likewise a citizen of New York?

However, if by any line of reasoning a conclusion can be reached that a railway company incorporated by an Act of Congress is a citizen of one of the states of the Union, it must be on the principle that it has a certain fixed principal office and domicile in such a state. This office must be one where its corporate affairs are carried on and directed, and to which all other offices are subordinate. Certainly under the state of facts shown, before the trial court could maintain jurisdiction by reason of the diversity of citizenship the burden rested upon the pleader to show by express averments the citizenship of the defendant as being located in the state where the suit was brought, and likewise to exclude any presumption that the defendant was a citizen of a different state from that of the plaintiff.

It is our contention, however, that the railway corporation created by an Act of Congress and having the power to operate its line of railway in more than one state, and having even the power to maintain its principal office and domicile in a state other than the state or states in which it may own and operate lines of railway, shall be treated and declared a citizen of no state, for in truth and fact it is not. Its corporate power of existence is derived from Congress. This

corporate power is just as strong and has the same force and effect in one state as it has in the other, and no state can in any way impair the rights granted by Congress nor exclude it from its domain.

In the case of Scott vs. Choctaw, Oklahoma and Gulf Railroad Company (112 Fed., 180), it appeared that suit was brought against the Choctaw, Oklahoma and Gulf Railway Company, a federal corporation, and the Choctaw, Oklahoma and Memphis Railway Company, a state corporation. The federal corporation sought to remove the case from the state court on the ground of a separable controversy. It was contended that the federal corporation was not a citizen of any state and therefore could not remove on the ground of a diversity of citizenship. In the trial the district judge said :

> " In the case at bar the suit is not between citizens of different states because one of the defendants is a federal corporation and the other a state corporation."

For the foregoing reasons and upon the foregoing authorities the appellee asks that the decree of the District Court be affirmed.

Respectfully submitted,
THOMAS J. FREEMAN,
GEORGE THOMPSON,
Solicitors for appellee, Texas and Pacific Railway Company.

ARTHUR J. SHORES,
THOMAS J. FREEMAN,
GEORGE THOMPSON,
HENRY C. COKE,
ALEXANDER S. COKE,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, as Trustee,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

ADDITIONAL BRIEF ON BEHALF OF APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY.

WINSLOW S. PIERCE,
LAWRENCE GREER,
Counsel for Protective Committee of Stockholders of The Texas and Pacific Railway Company,
37 WALL STREET,
New York City, N. Y.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1915. No. 889.

BANKERS TRUST COMPANY, as Trustee, Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

ADDITIONAL BRIEF ON BEHALF OF APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY.

This is an action brought in the District Court of the United States for the Northern District of Texas by Bankers Trust Company, a corporation of the State of New York, against The Texas and Pacific Railway Company, a railroad corporation created under certain Acts of Congress of the United States, to foreclose a mortgage made by the Railway Company under the authority contained in said Acts of Congress.

The sole question presented to this Court for its decision is, whether the District Court of the United States for the Northern District of Texas has jurisdiction of this action under the provisions of the Act of Congress approved January

28, 1915; and the question is therefore one of statutory construction as to the meaning and effect of that Act.

It is conceded that if the action had been instituted before the approval of the Act of January 28, 1915, the Court below would have had jurisdiction, for the reason that the Railway Company is incorporated under an Act of Congress and that a suit by or against it necessarily involves a controversy arising under the Constitution and laws of the United States, thus conferring jurisdiction on the Federal Courts.

This jurisdictional right or privilege was judicially determined by this Court in the *Pacific Railroad Removal Cases* (115 U. S., 1), the decision of the Court in those cases being based upon the doctrine announced in the case of *Osborn vs. Bank of the United States* (9 Wheat., 738).

The Pacific Removal Cases.

The principle in question involved in these cases was, whether a suit brought in a State Court against a corporation of the United States might be removed by such corporation into the Federal Court on the ground of its being a corporation organized under the law of the United States. The particular corporations concerned in these cases were the Union Pacific Railway Company and The Texas and Pacific Railway Company, and the suits were all brought originally in State Courts and removed by the defendant corporations into the Federal Courts.

In holding that the defendant corporations were entitled, as corporations created by and organized under Acts of Congress, to remove into the Federal Courts suits brought against them in the State Courts, this Court based its decision upon the case of *Osborn vs. Bank* and said :

> " An examination of those acts of Congress shows that the corporations now before us, not only derive

their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof, sustain important relations to the Government of the United States."

Osborn vs. Bank.

In this case the question considered and decided was, whether a case in which a United States bank was a party was, for that reason, a case arising under the laws of the United States ; and, in so holding, this Court said :

"The charter of incorporation not only creates it (the United States Bank), but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law ? Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue ? Has it a right to come, not into this court particularly, but into any court ? This depends on a law of the United States. The next question is, has this being a right to make this particular contract ? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case."

The sole question, therefore, for determination is, as above stated :

Has the jurisdiction of the Federal Courts over cases by or against The Texas and Pacific Railway Company, heretofore existing, as judicially determined by this Court, been taken away by the Act of Congress of January 28, 1915 ?

It will not be disputed that Congress had the power and right to so restrict the jurisdiction of the Federal Courts whether or not such action on its part would be equitable or inequitable, the question being not what Congress should do, or should have done, but only what it actually accomplished.

The Section of the Act of January 28, 1915, under consideration reads as follows :

> " No Court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

Contention is made that the real purpose and object was to prevent the Texas and Pacific Railway Company from exercising any greater rights of removal of causes into the Federal Courts than were possessed by other railroad corporations, and in support of this contention reference is made to the reports of committees and other proceedings and debates in Congress.

In construing this Act of Congress the same rules of interpretation as those affecting any other written instrument must be applied, and where the language of the instrument is clear and unambiguous its meaning and intent must be determined by attributing to these words their usual and customary significance, with the assumption, also, that each word employed is to be considered in arriving at a proper construction of the entire instrument.

In the present case the language employed by Congress is

clear and unmistakable, and it must be assumed that it adopted the Act in question with full knowledge on its part of the scope and effect of all decisions theretofore rendered by this Court relating to the subject-matter of the Act.

The Act of January 28, 1915, deprives the Federal Courts of *any* action or suit *by* or *against* any railroad corporation upon the ground that it is incorporated under the laws of the United States. An action brought by any such railroad corporation would certainly not be one involving the corporation's right of removal, but would be an original action instituted by it in which the jurisdiction of the Federal Court was invoked by the Federal corporation.

A suit *against* such a railroad corporation might also be a suit where such jurisdiction was claimed by the adverse party to enforce a claim or demand against the Federal corporation.

As has been determined by this Court in the cases above cited, the power to create the jurisdiction existing in the Federal Courts prior to the passage of the Act of January 28, 1915, rested solely on the truth of the proposition that a suit *by* or *against* Federal corporations would be a suit arising under the laws of the United States.

Before the passage of the Act of January 28, 1915, jurisdiction of the Federal Courts could be invoked in all suits against The Texas and Pacific Railway Company because it was incorporated under Acts of Congress, and to that authority owed the possession of all of its faculties. Jurisdiction of the Federal Courts upon this ground was expressly, and by unmistakable terms, taken away by the Act of January 28, 1915.

The Congressional legislation affecting national banks and the judicial construction of such legislation, though interesting historically, has no bearing or application as a precedent in determining the question now presented.

The Act of January 28, 1915, is now presented, for the first time, for judicial construction. Prior to its passage

Federal jurisdiction existed in suits by or against Federal railroad corporations. Since its enactment Federal jurisdiction over suits by or against such corporations has been restricted. Is the present suit one of which the Federal Court has been deprived of jurisdiction by the Act? This is the only question for determination.

It is further contended that the Act of 1915 deprived the Federal Court of jurisdiction over cases by or against Federal corporations where jurisdiction of such cases was theretofore based upon the sole fact that one of the parties was created by Act of Congress. But the *origin* alone of the party never created jurisdiction, but rather the fact that its every act grows out of the law of its origin and must be tested and construed by it.

Assuming, as we must, that the Act of 1915 was intended to limit or restrict a jurisdiction previously granted to the Federal Courts, its operation and scope must be applied to a jurisdiction of suits involving acts of Federal railroad corporations arising out of the laws of their incorporation.

It is submitted that the question now presented may be answered briefly as follows:

The jurisdiction of the United States Courts, judicially determined to exist by the Osborn case and reiterated in the Pacific Removal Cases, was taken away as to cases by or against Federal railroad corporations by the Act of Congress January 28, 1915.

Jurisdiction of this action, on the ground of diverse citizenship, is urged in the appellant's brief, but with little vigor. In answering this contention it is perhaps sufficient to call to the intention of the Court that the necessary allega-

tions in this respect do not appear in the bill of complaint; at best it can only be said that allegations are made of *venue*.

If, however, in determining the question of jurisdiction it becomes necessary or desirable for this Court to judicially establish the citizenship of The Texas and Pacific Railway Company for jurisdictional purposes, then it is submitted that the domicile of the Company for that purpose should be fixed in the State of New York.

It is true that the lines of railroad of The Texas and Pacific Railway Company, as presently established, are located in the States of Texas, Louisiana and Arkansas, and that the greater part of its mileage is located in the State of Texas. It is also true that the offices of its chief accounting officer and General Superintendent are situated in that State. The offices of the First Vice-President (the principal operating officer), the General Traffic Manager (the principal traffic officer) and the General Solicitor (the principal legal officer), however, are situated in the State of Louisiana. In the State of New York the general executive offices of the Railway Company are maintained. The Chairman of the Board, the President, a Vice-President and the Secretary and Treasurer have their offices in New York City. The Board of Directors of the Company holds its meetings in New York, and at that place also the stock of the Company is transferred, interest on its bonded indebtedness is paid, its principal bank deposits are maintained and its treasury securities are kept. In other words, the executive headquarters of the Railway Company, where the policy of its business is determined and its financial affairs are directed, is and has been, since the incorporation of the Railway Company, established and maintained in the City of New York.

These facts, although not appearing in the record, will not be disputed and are matters of common knowledge.

The question of domicile of The Texas and Pacific Rail-

way Company, for jurisdictional purposes, is a question which has heretofore received the consideration of this Court.

By the provisions of the Interstate Commerce Act it was provided that if any common carrier subject thereto shall neglect to obey any lawful order of the Commission it shall be lawful for the Commission to proceed against such carrier in the Circuit Court of the United States sitting in equity, "in the judicial district in which the common carrier complained of has its principal office."

Such a proceeding was instituted by the Commission against The Texas and Pacific Railway Company, in the year 1892, in the Circuit Court of the United States for the Southern District of New York. The Railway Company objected to the jurisdiction of the Court, and the Circuit Court of Appeals, in upholding such jurisdiction, said in its opinion (*Interstate Commerce Commission vs. Texas and Pacific Railway Company*, 57 Fed. Rep., 948–955):

> "This petition was brought in the Southern District of New York, on the ground that the principal office of the defendant was in the City of New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the defendant shall be. In fact, the stockholders' meetings and directors' meetings are held in New York, where also is the office of the president, first vice-president, secretary, and treasurer of the company, and where the stock certificate books and records of the stockholders' and directors' meetings are kept. The New York office is thus the domicile of the corporation, and the principal office, while the general or administrative offices of the heads of departments are in Texas."

On appeal to that Court (*Texas and Pacific Railway Company vs. Interstate Commerce Commission*, 162 U. S., 197) this Court sustained the ruling of the Court below on this point.

It is submitted, however, that the matter of diversity of citizenship as a basis of jurisdiction of the Federal Courts has

no application or relevancy in connection with suits by or against The Texas and Pacific Railway Company.

Before the passage of the Act of January 28, 1915, jurisdiction of the Federal Courts over actions by or against railroad corporations incorporated under Acts of Congress did not exist upon the ground of diverse citizenship, but rested, exclusively, upon the truth of the proposition that all actions by or against such railroad corporations arose under the Constitution or laws of the United States.

Jurisdictions of actions by or against such railroad corporations on the ground of diversity of citizenship was certainly not created or attempted to be created by the terms of the Act of January 28, 1915.

The truth of the first proposition was declared by this Court in that portion of the opinion in the Pacific Removal Cases (*supra*) where the decision of this Court in the Osborn case is analyzed. In classifying the cases—four in number and one embracing controversies between citizens of different states—to which the judicial power of the United States is confined by the Constitution, this Court pointed out that suits by or against the United States Bank could not possibly belong to any of these classes except the one which included cases arising under the Constitution and laws of the United States, and said (p. 12):

> "Unless, therefore, a case in which the bank was a party was for that reason a case arising under the laws of the United States, Congress would not have had the power to authorize it to sue and to be sued in the Circuit Court of the United States."

This fundamental principle was the entire foundation upon which the jurisdiction of the United States Courts over suits by or against Federal railroad corporations rested by the decision of this Court in the Pacific Removal Cases.

It may be that an additional basis for such jurisdiction has

been established by Congress through subsequent legislation in the case of national banks, and could be so established in the case of Federal railroad corporations. The fact remains, however, that as to Federal railroad corporations no such legislation has been enacted since the decision of this Court in the Pacific Removal Cases, and that, therefore, diversity of citizenship should be excluded as forming a basis of Federal jurisdiction of actions by or against such corporations, such jurisdiction, until the passage of the Act of January 28, 1915, remaining founded upon the sole ground that such suits necessarily arose under the Constitution or laws of the United States.

The Act of January 28, 1915, was one which did not enlarge but rather restricted the jurisdiction of Federal Courts over suits by or against Federal railroad corporations.

The Texas and Pacific Railway Company was created and remains a citizen of the United States, and has not been jurisdictionally domiciled or established, either by statute or Court decision, as a citizen of any state.

In pointing out to the Court the perplexing jurisdictional situation which has been created by the passage of the Act of January 28, 1915, and in suggesting that the proper construction to be placed upon that Act will necessarily deprive the Court below of jurisdiction of this action, it must not be supposed that the parties are moved by any feeling of preference for any other tribunal; quite the contrary is the fact.

The questions involved in this action are of the highest importance as well as of great financial magnitude. Their submission to the United States District Court for the Northern District of Texas would assure a judicial determination controlled by the application of profound legal learning and wide experience on the part of that Court. It is obvious,

however, that—as much in the interest of that Court as for the protection of the rights of the parties—it is essential that its decision should rest upon the sound foundation of an established jurisdiction.

Respectfully submitted,

WINSLOW S. PIERCE,
LAWRENCE GREER,
Counsel for Protective Committee of Stockholders
of The Texas and Pacific Railway Company,
37 Wall Street, New York City, New York.

BANKERS TRUST COMPANY *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 889. Argued April 12, 13, 1916.—Decided May 22, 1916.

In a suit brought by a corporation existing under the laws of New York and therefore a citizen of that State, against the Texas & Pacific Railway Company, incorporated and existing under an act of Congress and certain supplemental and amendatory acts, *held* that:

The provision in § 1 of the act of 1871 under which the Texas & Pacific

Railway was incorporated, that such company may sue and be sued in all courts of law and equity within the United States, was not intended to confer jurisdiction upon any particular court, but merely to render the company capable of suing and being sued in any court whose jurisdiction as otherwise competently defined was adequate to the occasion.

It is reasonable to presume that if Congress has the purpose to take a class of suits out of usual jurisdictional restrictions relating thereto, it will make its purpose plain.

Under the Constitution, Congress possesses power to invest subordinate Federal courts with original jurisdiction of suits at law or equity arising under the Constitution, laws or treaties of the United States and this power has been exercised at various times. Such jurisdiction has by § 24, Judicial Code, been given to and is now vested in, the District Courts subject to a restriction as to the amount in controversy.

A corporation chartered by an act of Congress is not only a creature of that law, but all its rights are dependent thereon and a suit by or against such a corporation is one arising under a law of the United States.

Section 5 of the act of January 28, 1915, c. 22, 38 Stat. 583, providing that no court of the United States shall have jurisdiction of any suit by or against any railroad company on the ground that it was incorporated under an act of Congress, is amendatory of the Judicial Code and renders the fact of incorporation under an act of Congress a negligible factor in determining whether a suit by or against a railroad company is one arising under a law of the United States so as to give the District Court jurisdiction thereof.

A corporation, such as the Texas & Pacific Railway Company, incorporated under acts of Congress, and whose activities and operations are not by its charter confined to any State, but are intended to be, and are, carried on in different States, is not a citizen of a State within the meaning of the jurisdictional statute.

While such a corporation is a citizen of the United States in the sense that a corporation organized under the law of a State is a citizen of that State, it is not within the declaration of the Fourteenth Amendment that native born and naturalized citizens of the United States are citizens of the State in which they reside.

Congress has not clothed railroad corporations organized under acts of Congress with state citizenship for jurisdictional purposes as it has done in respect to National banks.

A suit by a citizen of a State against a railroad corporation organized

and existing under an act of Congress is not a suit between citizens of different States of which the District Court has jurisdiction under § 24, Judicial Code, as amended by the act of January 28, 1915.

THE facts, which involve the jurisdiction of the District Court of a suit against a corporation incorporated by a statute of the United States, are stated in the opinion.

Mr. Maurice E. Locke, with whom *Mr. William W. Green* was on the brief, for appellant:

Jurisdiction to hear and determine such suits as this against the Texas and Pacific Railway Company was expressly vested in the appropriate Federal courts by the act of Congress incorporating said company. Act of March 3, 1871, c. 122, § 1, 16 Stat. 573; Act of May 2, 1872, c. 132, § 1, 17 Stat. 59; *Smith* v. *Un. Pac. R. R.*, 2 Dillon, 278; *Bauman* v. *Un. Pac. R. R.*, 3 Dillon, 367; *Pac. R. R. Removal Cases*, 115 U. S. 1, 24; *Matter of Dunn*, 212 U. S. 374, 384; *Osborn* v. *Bank*, 9 Wheat. 738; *Magill* v. *Parsons*, 4 Connecticut, 317, 336.

The jurisdiction of this case expressly conferred by the act of March 3, 1871, has not been taken away by the act of January 28, 1915. Cases *supra* and *Magee* v. *Un. Pac. R. R.*, 2 Sawyer, 447; *Un. Pac. R. R.* v. *McComb*, 1 Fed. Rep. 799; *Tex. & Pac. Ry.* v. *McAllister*, 59 Texas, 349; *Myers* v. *Un. Pac. Ry.*, 16 Fed. Rep. 292; *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644; *Butler* v. *National Home*, 144 U. S. 64; *Wash. & Idaho R. R.* v. *Coeur d'Alene Ry.*, 160 U. S. 77; *Tex. & Pac. Ry.* v. *Cody*, 166 U. S. 606; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119; *Tex. & Pac. Ry.* v. *Archibald*, 170 U. S. 665; *Tex. & Pac. Ry.* v. *Barrett*, 166 U. S. 617; *Tex. & Pac. Ry.* v. *Behymer*, 189 U. S. 468; *Charnock* v. *Tex. & Pac. Ry.*, 194 U. S. 432; *Tex. & Pac. Ry.* v. *Dashiell*, 198 U. S. 521; *Tex. & Pac. Ry.* v. *Gentry*, 163 U. S. 353; *Tex. & Pac. Ry.* v. *Swearingen*,

196 U. S. 51; *Tex. & Pac. Ry.* v. *Watson*, 190 U. S. 287; *Tex. & Pac. Ry.* v. *Eastin*, 214 U. S. 153; *Tex. & Pac. Ry.* v. *Howell*, 224 U. S. 577; *Tex. & Pac. Ry.* v. *Harvey*, 228 U. S. 319; *Tex. & Pac. Ry.* v. *Stewart*, 228 U. S. 357; *Tex. & Pac. Ry.* v. *Rosborough*, 235 U. S. 429; *Tex. & Pac. Ry.* v. *Hill*, 237 U. S. 208; *Tex. & Pac. Ry.* v. *Bigger*, 239 U. S. 330.

As to construction of the statute, see Dwarris (2d ed.), 532; Sedgwick (2d ed.), 97; Maxwell on Interp. Stat. (5th ed.), 131, 285, 291; Beal's Rules of Legal Interp. (2d ed.), 463; Endlich on Interp., §§ 223, 228–9; 1 Sutherland on Stat. (2d ed.), §§ 274–5; Black on Interp. (2d ed.), 328; Broom's Legal Max. (8th ed.), 19; *Ex parte Crow Dog*, 109 U. S. 556; *Rodgers* v. *United States*, 185 U. S. 83; *United States* v. *Nix*, 189 U. S. 199.

The history of the passage of § 5 of the act of January 28, 1915, shows that Congress intended to take away from the Federal courts only their jurisdiction of the litigations of railroad companies resting upon the ground that such companies were incorporated under act of Congress, or in other words only such jurisdiction as was dependent upon the existence of a constructive Federal question arising from the mere fact of Federal incorporation.

For the purpose of ascertaining the intent of Congress it is proper to consider the development of the act itself, the reports of committees relative thereto, and other similarly definite and reliable indicia. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Binns* v. *United States*, 194 U. S. 486; *United States* v. *Nakashima*, 87 C. C. A. 646, 160 Fed. Rep. 842; *Symonds* v. *St. Louis & S. E. Ry.*, 192 Fed. Rep. 335–6, 353.

It also is proper in interpreting a statute to consider the environment, the history of the times, and the particular evil which was pressing upon the attention of Congress, and for which it was seeking a remedy. For this purpose

the court may avail itself of all accessible sources of information, including the proceedings and debates in Congress. Cases *supra* and *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50; *United States* v. *Un. Pacific R. R.*, 91 U. S. 72, 79; *Taylor* v. *United States*, 152 Fed. Rep. 1; 52 Cong. Rec. 282, 283, 1544.

There is jurisdiction by reason of the Federal questions which exist and give rise to Federal jurisdiction, unless Federal jurisdiction has been taken away by the act of 1915 which has not been the case.

A suit to enforce a railroad mortgage given by a federally chartered company necessarily involves one or more Federal questions that are not merely constructive in their character.

A railroad company has only such power to mortgage its property essential to the performance of its public duties as its charter and other governing laws confer expressly or by necessary implication. Jones on Corporate Bonds, §§ 1-4; Baldwin on American R. R. Law, 463; *Commonwealth* v. *Smith*, 10 Allen, 448.

That this is a suit to enforce a railway mortgage is either shown by express averment or judicially noticed by the court and is an essential element of the plaintiff's bill. *Frye* v. *Bank of Illinois*, 5 Gilman (10 Ill.), 322; *Inter. & Great North. R. R.* v. *Underwood*, 67 Texas, 589; *East Line Ry.* v. *Rushing*, 69 Texas, 307.

A question determinable by the interpretation and application of an act of Congress is a Federal question. *Ames* v. *Kansas*, 111 U. S. 449; *Howard* v. *United States*, 184 U. S. 676; *Cummings* v. *Chicago*, 188 U. S. 410; *Male* v. *Atchison, T. & S. F. Ry.*, 240 U. S. 97; *Oregon* v. *Three Sisters Irrigation Co.*, 158 Fed. Rep. 346; *Bowers* v. *First National Bank*, 190 Fed. Rep. 676; *McGoon* v. *Nor. Pac. Ry.*, 204 Fed. Rep. 998.

The act of January 28, 1915, does not deprive the Federal courts of their jurisdiction of this case arising out of

the Federal questions therein involved. *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644; *Continental Nat. Bank* v. *Buford*, 191 U. S. 119; *Bowers* v. *First Nat. Bank*, 190 Fed. Rep. 676; *Walker* v. *Windsor Nat. Bank*, 5 C. C. A. 421, 56 Fed. Rep. 76; *Huff* v. *Union Nat. Bank*, 173 Fed. Rep. 333.

The validity and effect of the various provisions of the mortgage must be determined with reference to the acts of 1873 and 1874, which are not acts of incorporation.

The court has jurisdiction of this cause on the ground of diversity of citizenship, which is sufficiently shown by the record. The absence of a direct averment that it is a citizen of Texas is immaterial, since all the facts are alleged from which citizenship appears as the necessary legal intendment. *Sun Printing Assn.* v. *Edwards*, 194 U. S. 377; *Marshall* v. *Balt. & Ohio R. R.*, 16 How. 314; *Balt. & Ohio S. W. R. R.* v. *Davis*, 149 Fed. Rep. 191; *Mathieson Works* v. *Mathieson*, 150 Fed. Rep. 241.

The facts above stated with reference to the defendant The Texas and Pacific Railway Company constitute it a citizen of Texas for purposes of jurisdiction of the Federal courts in this cause. *Bank of United States* v. *Deveaux*, 5 Cranch, 61; *Railroad* v. *Letson*, 2 How. 497; *Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *St. Louis National Bank* v. *Allen*, 5 Fed. Rep. 551; *Manufacturers National Bank* v. *Baack*, 8 Blatchf. 137; *Orange Nat. Bank* v. *Traver*, 7 Fed. Rep. 146; *National Park Bank* v. *Nichols*, 17 Fed. Cas. 1224; *Main* v. *Second Nat. Bank*, 16 Fed. Cas. 509; *Union Pacific Ry.* v. *Harris*, 158 U. S. 326; *North. Pac. R. R.* v. *Amato*, 144 U. S. 465.

A citizen of the United States, residing in any State of the Union, is a citizen of that State. *Gassies* v. *Ballon*, 6 Pet. 761.

A corporation may, for the purposes of suit, be said to

be born where by law it is created and organized. *Railroad* v. *Koontz*, 104 U. S. 5; *Matter of Dunn*, 212 U. S. 374.

As it is a citizen of the United States and a resident of Texas, defendant is a citizen of Texas for jurisdictional purposes in this cause.

The act of January 28, 1915, does not deprive the Federal courts of their jurisdiction of this case arising out of diversity of citizenship.

Mr. George Thompson and *Mr. Henry C. Coke*, with whom *Mr. Thomas J. Freeman*, *Mr. Arthur J. Shores* and *Mr. Alexander S. Coke* were on the brief, for appellees.

Mr. Winslow S. Pierce and *Mr. Lawrence Greer* filed a brief for appellees as counsel for the Protective Committee of Stockholders of the Texas & Pacific Railway Company.

Mr. Justice Van Devanter delivered the opinion of the court.

This is a suit to foreclose a railroad mortgage and for other incidental relief. It was brought in the District Court for the Northern District of Texas December 27, 1915, was dismissed by that court for want of jurisdiction and is here upon a direct appeal under § 238 of the Judicial Code.

The bill alleges that the plaintiff, the trustee under the mortgage, is a New York corporation and "a citizen of said State"; that the Texas and Pacific Railway Company, one of the defendants, is a corporation created and existing under the laws of the United States, has its principal place of business and its principal operating and general offices in the Northern District of Texas, and "is a resident and inhabitant" of that district; that the New Orleans Pacific Railway Company, the other de-

fendant, is a Louisiana corporation and "a citizen of said State"; that one of the acts of Congress under which the Texas and Pacific Railway Company was created and now exists (act March 3, 1871, c. 122, § 1, 16 Stat. 573) provides that such company "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States"; that under that act and designated amendatory and supplemental acts of Congress (May 2, 1872, c. 132, 17 Stat. 59; March 3, 1873, c. 257, 17 Stat. 598; June 22, 1874, c. 406, 18 Stat. 197) said company came to own and hold on February 1, 1888, certain railroad properties and interests in Texas and Louisiana; that on that date said company, "acting in pursuance of due authority conferred upon it by said acts of Congress", the relevant portions of which are copied into the bill, and the New Orleans Pacific Railway Company, acting in pursuance of authority conferred upon it by the laws of Louisiana, executed and delivered the mortgage in suit covering these railroad properties and interests, a substantial part of which is situate in the Northern District of Texas; that the mortgage was duly filed and recorded in the Department of the Interior pursuant to such acts of Congress; that the mortgagors have defaulted in the performance of the terms and conditions of the mortgage, and that the suit involves the requisite jurisdictional amount and "arises under the Constitution and laws of the United States."

By a motion to dismiss the Texas and Pacific Railway Company challenged the jurisdiction of the District Court upon the grounds that the act of January 28, 1915, c. 22, § 5, 38 Stat. 803, provides: "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress," and that apart from the Texas and Pacific Rail-

way Company's incorporation under congressional enactments the suit is not one arising under the Constitution or any law of the United States, and is not one between citizens of different States. The motion was sustained and the bill was dismissed as to both defendants.

The plaintiff insists that in refusing to entertain the suit the District Court erred because (1) the provision before quoted from § 1 of the act of March 3, 1871, enables the Texas and Pacific Railway Company to sue and be sued in any court of law or equity within the United States; (2) the bill shows that the suit is one arising under the laws of the United States apart from the incorporation of the Texas and Pacific Railway Company under acts of Congress, and therefore the act of January 28, 1915, is not controlling, and (3) the bill shows that the suit is between citizens of different States.

1. Upon reading § 1 of the act of 1871 it is plain that the words "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States" were not intended in themselves to confer jurisdiction upon any court. As the context shows, Congress was not then concerned with the jurisdiction of courts but with the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court of law or equity—Federal, state or territorial—whose jurisdiction as otherwise competently defined was adequate to the occasion. Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words. The case of *Bank of the United States* v. *Deveaux*, 5 Cranch, 61, 85, is well in point. A

provision in the act incorporating the bank, c. 10, § 3, 1 Stat. 191, much like that here relied upon, was invoked as in itself entitling the bank to sue in a Circuit Court of the United States, but that view was rejected in an opinion by Chief Justice Marshall, wherein it was said:

"That act creates the corporation, gives it capacity to make contracts and to acquire property, and enables it 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever.' This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the same, if brought by individuals. If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be."

Afterwards, when the second bank of the United States was established, a provision was inserted in the incorporating act, c. 44, § 7, 3 Stat. 266, enabling the bank to sue and be sued "in all state courts having competent jurisdiction, and in any Circuit Court of the United States," and in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, it was held (pp. 816–818) that this provision, unlike that in the prior act, amounted to an express grant of jurisdiction to the Circuit Courts and (pp. 823, *et seq.*) was within the power of Congress under the Constitution. It was in the light of these differing precedents in legislation and of the resulting difference in their interpretation that Congress framed the act of 1871. While that act does not literally follow either precedent, its words have the same generality and natural import as did those in the earlier bank act, and this strengthens the conclusion that Congress intended thereby to give to the Texas and

Pacific Railway Company only a general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, and not to establish an exceptional or privileged jurisdiction.

2. Under the Constitution Congress undoubtedly possesses power to invest the subordinate Federal courts with original jurisdiction of all suits at law or in equity arising under the Constitution, laws or treaties of the United States, and, if the act of February 13, 1801, c. 4, § 11, 2 Stat. 89, be not noticed because of its early repeal, c. 8, § 1, 2 Stat. 132, it is true, as sometimes has been said,[1] that this power was broadly exercised for the first time by the act of March 3, 1875, c. 137, § 1, 18 Stat. 470. By that act Congress in express terms gave the Circuit Courts original jurisdiction, concurrent with the courts of the several States, of all suits of that nature, where the value of the matter in dispute, exclusive of costs, was in excess of five hundred dollars, and this jurisdiction remained with the Circuit Courts until January 1, 1912, when they were abolished, save as the act of March 3, 1887, c. 373, § 1, 24 Stat. 552, required that the value of the matter in dispute, exclusive of interest and costs, be in excess of two thousand dollars. Upon the discontinuance of the Circuit Courts this jurisdiction was transferred to the District Courts by § 24 of the Judicial Code, subject to a restriction that thereafter the value of the matter in controversy should exceed three thousand dollars, exclusive of interest and costs.

As long ago as *Osborn* v. *Bank of the United States*, *supra*, it was settled that a suit by or against a corporation chartered by an act of Congress is one arising under a law of the United States, and this because, as was said in that case, pp. 823, 825: "The charter of incorporation

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[1] Tennessee *v.* Union and Planters' Bank, 152 U. S. 454, 459; Continental National Bank *v.* Buford, 191 U. S. 119, 122.

not only creates it [the corporation], but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. . . . The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter."

After the act of March 3, 1875, extended the jurisdiction of the Circuit Courts to cases arising under the laws of the United States, the ruling just quoted was uniformly followed and applied in suits by and against Federal corporations (*Pacific Railroad Removal Cases*, 115 U. S. 1; *Petri* v. *Commercial National Bank*, 142 U. S. 644, 648; *Butler* v. *National Home*, 144 U. S. 64; *Northern Pacific R. R.* v. *Amato*, 144 U. S. 465, 471; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593, 601; *Washington & Idaho R. R.* v. *Coeur d'Alene Ry.*, 160 U. S. 77, 93; *Knights of Pythias* v. *Kalinski*, 163 U. S. 289, 290; *Texas & Pacific Ry.* v. *Swearingen*, 196 U. S. 51, 53; *Matter of Dunn*, 212 U. S. 374, 383–384), save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enact-

ment, like that of July 12, 1882, c. 290, § 4, 22 Stat. 162, placing most of the suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States. *Leather Manufacturers' National Bank* v. *Cooper*, 120 U. S. 778, 781; *Continental National Bank* v. *Buford*, 191 U. S. 119, 122.

It results that if the general jurisdictional provision, now embodied in § 24 of the Judicial Code, respecting suits arising under the laws of the United States were alone to be considered, it would have to be held that the District Court had jurisdiction of the present suit as one falling within that class by reason of the incorporation of the Texas and Pacific Railway Company under a law of the United States. But § 5 of the act of January 28, 1915, must also be considered. It is a later enactment, is shown by the title to be amendatory of the Judicial Code, and, as has been seen, declares that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress." These are direct and comprehensive words and, when read in the light of the settled course of decision just mentioned, must be taken as requiring that a suit by or against a railroad company incorporated under an act of Congress be not regarded, for jurisdictional purposes, as arising under the laws of the United States, unless there be some adequate ground for so regarding it other than that the company was thus incorporated. Plainly, there was a purpose to effect a real change in the jurisdiction of such suits. Counsel for plaintiff concede that this is so. But they urge that all that is intended is to eliminate the mere creation of a railroad corporation under an act of Congress as a ground for regarding the suit as arising under the laws of the United States. In this there is an evident misapprehension of what constitutes incorporation, as

also of the real basis of the jurisdiction affected. A corporation is never merely created. Being artificial, possessing no faculties or powers save such as are conferred by law, and having in legal contemplation no existence apart from them, its incorporation consists in giving it individuality and endowing it with the faculties and powers which it is to possess. It is upon this theory that the decisions have proceeded. The ruling has been that a suit by or against a Federal corporation arises under the laws of the United States, not merely because the corporation owes its creation to an act of Congress, but because it derives all of its capacities, faculties and powers from the same source. This is shown in the quotation before made from *Osborn* v. *Bank of the United States, supra,* and also in the following excerpt from *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, 509–510: "A corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under a law of Congress." And so, when due regard is had for the terms of the amendatory section of 1915 and for the real basis of the jurisdiction affected, the conclusion is unavoidable that what is intended is to make the fact that a railroad company is incorporated under an act of Congress, that is to say, derives its existence, faculties and powers from such an act, an entirely negligible factor in determining whether a suit by or

against the company is one arising under the laws of the United States.

Upon examining the bill in the present suit, it is certain that it does not arise under those laws apart from the incorporation of the Texas and Pacific company under acts of Congress. We say "acts" of Congress, because the original act was amended and supplemented by three others, and the four constitute the company's charter. Portions thereof are copied into the bill as showing that the mortgage sought to be enforced was given under a power conferred by Congress, but this does not help the jurisdiction. As, under the amendatory section, the fact that the company derives its existence and all of its faculties and powers from a Federal charter cannot avail to give jurisdiction, it is obvious that to dwell upon the fact that any particular power comes from the common source must be equally unavailing.

The case of *Male* v. *Atchison, Topeka & Santa Fe Ry.*, 240 U. S. 97, does not make for a different conclusion, because it was not a suit by or against a railroad company incorporated under an act of Congress, and because it arose and was pending in this court prior to the amendatory act of 1915 and by § 6 of that act was excepted from its provisions.

3. Whether this is a suit between citizens of different States turns upon whether the Texas and Pacific Company is a citizen of Texas. It is doubtful that the pleader intended to state a case of diverse citizenship, but, be this as it may, we are of opinion that the company is not a citizen of any State. It was incorporated under acts of Congress, not under state laws; and its activities and operations were not to be confined to a single State, but to be carried on, as in fact they are, in different States. Of course it is a citizen of the United States in the sense that a corporation organized under the laws of one of the States is a citizen of that State, but it is not within the

clause of the Fourteenth Amendment which declares that native born and naturalized citizens of the United States shall be citizens of the State wherein they reside. Nor has Congress said that it shall be regarded as possessing state citizenship for jurisdictional purposes, as is done in respect of national banks by § 24, par. 16, of the Judicial Code. In short, there is no ground upon which the company can be deemed a citizen of Texas, and this being so, the suit is not one between citizens of different States.

Decree affirmed.